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Ir

CASE

OF THE

AMERICAN

A. K. CUTTING.

LATEST NOTES EXCHANGED

BETWEEN THE

Legation of the United States of America

AND THE

Minister of Foreign Relations of the Republic of Mexico.

WASHINGTON, D. C.:
JUDD & DETWEILER, PRINTERS.
1888.

LEGATION OF THE UNITED STATES,
MEXICO, *November* 15, 1887.

SIR: It will hardly surprise your Excellency to learn that, in this communication, I propose, by direction of my Government, to reopen the discussion of the important questions arising from the arrest, imprisonment, and sentence of Mr. A. K. Cutting, an American citizen, for an alleged offense committed outside of Mexican jurisdiction. The release of Mr. Cutting, by the Higher Court, on a mere minor point, settled only the question of his personal liberty. The vital issues remain; and now, when the excitement engendered by the first discussion of the case has disappeared, it is hoped that they may be considered with the judicial calmness and moderation which their importance demands.

The object of my Government in now reopening the case is twofold:

First: To say to your Excellency that, in the opinion of my Government, an indemnity should be paid to Mr. Cutting for his arrest and detention in Mexico on the charge of publishing a libel in the United States against a Mexican, and

Second: To suggest to your Excellency's Government that the statute proposing to confer such extraterritorial jurisdiction should be repealed, in the interests of good neighborhood and future amity, and because it is invasive of the independent sovereignty of a neighborly and friendly State.

I have already placed in your Excellency's possession, by command of my Government, a copy of a very able, indeed I may say an exhaustive report on "Extraterritorial Crime," which was prepared by request of the Department of State, with a special reference to the Cutting case. I ask your Excellency's most careful perusal of the same, and beg that it be considered a part of the papers in the case presented by my Government. After a calm examination of the report, I feel confident that your Excellency will see cogent

reasons for modifying the views enunciated by the Mexican Government at the first stage of the discussion of this important case, if indeed you do not cease to entertain a doubt of the untenability of the position assumed by the Mexican Government that its own obligations, under the Law of Nations, may be nullified by its own municipal laws.

Before proceeding to state why, in the opinion of my Government, an indemnity should be asked from Mexico, let me set forth some reasons why your Excellency's Government should so change its laws as to enable it to comply with its International obligations. And, with this view, I am directed to say to your Excellency that it would be highly honorable to the Mexican Government to follow in this regard the example of the Government of France, which in 1852 withdrew an objectionable measure similar to Article 186 of the Mexican Penal Code, in the interests of maintaining friendly relations with Great Britain. On the 10th of June, 1852, the *Corps Legislatif* of France adopted, by a vote of 191 to 5, a *projet de loi*, conferring upon the courts of France jurisdiction over offenses committed by foreigners against Frenchmen outside of France. In consequence of representations made by the Government of Great Britain, the measure was withdrawn. The Marquess of Normanby, formerly British Ambassador at Paris, thereupon declared in the House of Lords that during the whole period in which he had labored to maintain amicable relations between Great Britain and France, he had seldom listened to any statement with greater pleasure than that of the manner in which the French Government had withdrawn this objectionable *projet de loi*. In his instructions to me, Mr. Bayard refers to the above case, and observes as follows:

"Sincerely desirous of maintaining with the Government "of Mexico the most cordial and friendly relations, I cannot "think that that end could be more signally promoted than "by that Government following the highly honorable ex- "ample of France, in removing from the amicable relations "of the two countries a law which stands as a constant ". menace to their continuance."

In urging Mexico to adopt this course at this opportune moment, when the question can be considered dispassionately, my Government only suggests what it has put in practice itself, under circumstances somewhat similar. This is shown by the action of Congress in the McLeod case, which occurred in 1842, to which I beg leave to refer your Excellency. In that case, when, in reply to the demand of the British Government, for the release of the prisoner, who was in the custody of the authorities of the State of New York, the United States Government was obliged to refuse on the ground that the Federal authorities had no right to interfere, Congress amended the law regulating the issuance of writs of *habeas corpus*, so as to enable the United States Government to fulfill its International obligations. In that case the reply of the United States Government to the demand for release was not dissimilar from that made by your Excellency's Government to the demand for the release of Cutting. But the United States made all haste to conform its municipal laws to its international obligations.

Allow me to close this part of my communication by another quotation from the instructions on this subject which I have received from the Honorable Secretary of State. Mr. Bayard writes thus:

"The importance of the harmonious exercise of jurisdic-
"tional powers by the Governments of the United States and
"Mexico, and the desire of this Government to maintain the
"closest and most friendly relations between these two
"neighboring countries, were so impressively stated by the
"President in his last annual message to Congress, that it is
"proper to quote from it the following pertinent passage:

"'In the case of Mexico there are reasons especially strong
"for perfect harmony in the mutual exercise of jurisdiction.
"'Nature has made us irrevocably neighbors, and wisdom
"'and kind feeling should make us friends.

"'The overflow of capital and enterprise from the United
"'States is a potent factor in assisting the development of the
"'resources of Mexico, and in building up the prosperity of
"'both countries.

"'To assist this good work, all grounds of apprehension "'for the security of person and property should be removed; "'and I trust that in the interests of good neighborhood the "'statute referred to will be so modified as to eliminate the "'present possibilities of danger to the peace of the two "'countries.'"

To set forth clearly the reasons why an indemnity should be paid, it becomes necessary to recall the essential facts connected with the illegal arrest, detention, trial and sentence of Cutting, familiar though they be to your Excellency.

A. K. Cutting was arrested on June 23d, 1886, at the request of Emigdio Medina, a citizen of Paso del Norte, on account of the publication of an alleged libel in Texas. He was brought before the Mexican Court, refused counsel and an interpreter when he asked for them, was not allowed to give bail though ready to do so, was thrown into prison, and subjected to great cruelty while so confined. All this because he committed an act in Texas objectionable to a Mexican citizen, and because a Mexican Judge considered himself competent to so punish an American citizen, under an article of the Mexican Penal Code, called Article 186, which translated is to the following effect:

"Penal offenses committed in a foreign country by a "Mexican against Mexicans or foreigners, or by a foreigner "against Mexicans, may be punished in the Republic "(Mexico) and according to its laws, subject to the following "conditions:

"I. That the accused be in the Republic, whether he has "come voluntarily or has been brought by extradition pro- "ceedings.

"II. That, if the offended party be a foreigner, he shall "have made proper legal complaint.

"III. That the accused shall not have been definitively "tried in the country where the offense was committed, or, "if tried, that he shall not have been acquitted, included in "an amnesty, or pardon.

" IV. That the breach of law of which he is accused shall " have the character of a penal offense, both in the country " in which it is committed and in the Republic.

" V. That by the laws of the Republic the offense shall be " subject to a severer penalty than that of *arresto mayor* " (detention from 1 to 11 months ").

My Government denied the right of your Excellency's Government to assume jurisdiction of the case merely by force of a municipal law, violative of the well-recognized principles of international law. Mr. Bayard demanded the release of Cutting on the grounds:

First: That the judicial tribunals of Mexico were not competent, under the rules of International Law, to try a citizen of the United States for an offense committed and consummated in his own country, and merely because the person offended happened to be a Mexican, and

Second: Because the sanctions of justice, which all civilized nations hold in common, had been violated by his treatment.

" Among these sanctions," it was stated, " are the right of " having the facts on which the charge of guilt was made, " examined by an impartial Court, the explanation to the " accused of these facts, the opportunity granted to him of " counsel, such delay as is necessary to prepare his case, per- " mission in all cases, not capital, to go at large on bail, till " trial, the due production, under oath, of all evidence preju- " dicing the accused, giving him the right of cross-exami- " nation, the right to produce his own evidence in exculpa- " tion, release even from temporary imprisonment in all " cases where the charge is simply one of threatened breach " of the peace, and where due security to keep the peace is " tendered."

I am directed to say to your Excellency that the importance of this second ground upon which Mr. Cutting's release was demanded is not to be underestimated, although in the

course of time it was overshadowed by the jurisdictional question raised by the claim of the Mexican Government of a right to try and to punish a citizen of the United States for an offense committed by him in his own country against a Mexican.

"Not only was this claim," says Mr. Bayard, "which is "defined in Article 186 of the Mexican Penal Code, defended "and enforced by Judge Zubia, before whom the case of Mr. "Cutting was tried, and whose decision was affirmed by the "supreme Court of Chihuahua, but the claim was defended "and justified by the Mexican Government in communica- "tions to this Department, emanating both from the Mexi- "can Minister at this capital and from the Department of "Foreign Affairs in the city of Mexico.

"The statement of the Consul at Paso del Norte that Mr. "Cutting was arrested on the charge of the publication in "Texas of an alleged libel against a Mexican, is fully sus- "tained by the opinion of Judge Zubia. Under the head "of 'It appears 6,' in that decision, it is stated that on the "22d of June, 1886, 'the plaintiff enlarged the accusation, "'stating that although the newspaper the *El Paso Sunday* "'*Herald* is published in Texas, Mr. Cutting had had cir- "'culated a great number in this town and in the interior "'of the Republic, it having been read by more than three "'persons, for which reason an order had been issued to "'seize the copies which were still in the office of the said "'Cutting.' The conclusive inference from this statement "is that the charge upon which the warrant of arrest was "previously issued was the publication of the alleged libel "in Texas. It matters not whether such publication was "originally treated by the Court as a breach of a conciliation "previously entered into between Cutting and Medina, the "Mexican plaintiff, or whether it was treated as a distinct "and original offense. In either case, the assumption of the "Mexican tribunal, under the law of Mexico, to punish a "citizen of the United States for an offense wholly com- "mitted and consummated in his own country against its "laws, was an invasion of the independence of this Govern- "ment. To say that a conciliation in Mexico, which operates

" as a stay of criminal proceedings there, binds a citizen of " the United States in his own country, is simply to assert " that the Mexican penal law is binding upon citizens of the " United States in their own country. It appears, however, " under 'Considering 6,' in Judge Zubia's decision, that the " claim made in Article 186 of the Mexican Penal Code was " actually enforced in the case in question as a distinct and " original ground of prosecution. The decision of Judge " Zubia was framed in the alternative, and it was held that, " even supposing the defamation arose solely from the pub- " lication of the alleged libel in the *El Paso* (Texas) *Sunday* " *Herald*, Article 186 of the Mexican Penal Code provided for " punishment in that case, Judge Zubia saying that it did " not belong to the judge to examine the principle laid down " in that article, but to apply it fully, it being the law in force " in the State of Chihuahua. It nowhere appears that the " Texas publication was ever circulated in Mexico so as to " constitute the crime of defamation under the Mexican law. " As has been seen, this was not a part of the original charge " on which the warrant for Mr. Cutting's arrest was issued; " and while it is stated in Judge Zubia's decision that an " order was issued for the seizure of copies of the Texas " paper which might be found in the office of Mr. Cutting " in Paso del Norte, it nowhere appears from that decision " that any copies were actually found in that place or else- " where in Mexico.

" But, however this may be, this Government is still com- " pelled to deny, what it denied on the 19th of July, 1886, " and what the Mexican Government has since Executively " and judicially maintained, that a citizen of the United " States can be held under the rules of International Law to " answer in Mexico for an offense committed in the United " States, simply because the object of that offense happened " to be a citizen of Mexico. The Government of Mexico has " endeavored to sustain this pretension on two grounds: " First, that such a claim is justified by the rules of Interna- " tional Law and the positive legislation of various countries; " and, secondly, on the ground that such a claim being made " in the legislation of Mexico, the question is one solely for

" the decision of the Mexican tribunals. In respect of the " latter ground it is only necessary to say, that if a Govern- " ment could set up its own municipal laws as the final test " of its international rights and obligations, then the rules " of International Law would be but the shadow of a name, " and would afford no protection either to States or to indi- " viduals. It has been constantly maintained and also ad- " mitted by the Government of the United States, that a " a Government cannot appeal to its municipal regulations " as an answer to demands for the fulfilment of international " duties. Such regulations may either exceed or fall short " of the requirements of International Law, and in either " case that Law furnishes the test of the nation's liability, and " not its own municipal rules. This proposition seems now " to be so well understood and so generally accepted, that it " is not deemed necessary to make citations or to adduce " precedents in its support."

In proceeding to the consideration of the Mexican jurisdictional claim in connection with the principles of International Law, Mr. Bayard bids me say that he has not contended, as seems to have been assumed, that if Mr. Cutting had actually circulated in Mexico a libel printed in Texas, in such a manner as to constitute a publication of the libel in Mexico, within the terms of the Mexican Law, he could not have been tried and punished for the offense in Mexico.

As to the question of International Law, Mr. Bayard is unable to discover any principle upon which the assumption of jurisdiction, made in Article 186 of the Mexican Penal Code can be justified. " There is no principle better set- " tled," observes Mr. Bayard, " than that the penal laws of " a country have no extraterritorial force. Each State may, " it is true, provide for the punishment of its own citizens " for acts committed by them outside of its territory; but " this makes the penal law a personal statute, and while it " may give rise to inconvenience and injustice in many " cases, it is a matter in which no other Government has " the right to interfere. To say, however, that the penal " laws of a country can bind foreigners and regulate their

" conduct, either in their own or any other foreign country,
" is to assert a jurisdiction over such countries, and to im-
" pair their independence. Such is the *consensus* of opinion
" of the leading authorities on International Law at the
" present day. There being then no principal of Inter-
" national Law which justifies such a pretension, any asser-
" tion of it must rest, as an exception to the rule, either upon
" the general concurrence of nations or upon express con-
" ventions. Such a concurrence in respect to the claim
" made in Article 186 of the Mexican Penal Code cannot be
" found in the legislation of the present day. Though for-
" merly asserted by a number of minor States, it has now
" been generally abandoned, and may be regarded as almost
" obsolete.

" The only assertion I have found in the legislation of
" Europe of a general jurisdiction by one State of offenses
" committed abroad by foreigners against subjects is in the
" cases of Greece and Russia. The legislation of these
" countries gives to the judicial tribunals general jurisdiction
" over such offenses. In Sweden and Norway their punish-
" ment is discretionary, and depends upon the King ordering
" the prosecution. In Austria felonies but not misdemean-
" ors" (the charge against Mr. Cutting of libel is only a mis-
demeanor, not only under the Mexican law but under that of
Texas) "committed by foreigners abroad, are punished, but
only" (except in crimes against the safety of the State and
against the National seals and moneys, etc.) " after an offer of
" surrender of the accused person has first been made to the
" State in which the crime has been committed, and has been
" refused by it. The law is substantially the same in Hun-
" gary and in Italy; but criminal offenses, committed outside
" the State by foreigners against the citizens or subjects, are
" not punished, under any circumstances or conditions,
" by France, Germany, Belgium, Denmark, Great Britain,
" Luxembourg, The Netherlands, Portugal, Spain and Switzer-
" land.

" It is thus seen that Russia and Greece are the only
" European countries whose claim of extraterritorial jurisdic-
" tion is as extensive and absolute as that of Mexico; for it

" was held by Judge Zubia, whose decision was affirmed by
" the Supreme Court of Chihuahua that it did not belong to
" the judicial tribunals of Mexico to examine the principle
" laid down in Article 186, but to apply it in all force, it
" being the law of the State of Chihuahua, and Mr. Mariscal
" disclaimed any power on the part of the Mexican Executive
" to interfere with the execution of the law by the judicial
" tribunals. Thus the Mexican claim is absolute, and exceeds
" that made by Sweden and Norway, where the prosecution
" can only take place if the King orders it."

Neither do the laws of France sustain the principle set forth in Article 186. A careful examination of those laws shows that the French code authorizes the prosecution of foreigners for offenses outside of the territory of France, only in the exceptionable cases of crimes against the safety of the State and of counterfeiting the seal of the State, as well as national moneys having circulation, national papers or bank-bills authorized by law.

The Court of Cassation of France decided in 1873, in the case of Raymond Fornage, which your Excellency will find fully set forth in the report on " Extraterritorial Crime," that, with the exception of the crimes already mentioned, the French tribunals are without power to judge foreigners for acts committed by them in a foreign country, that their incompetence in this regard is absolute and permanent, that it can be waived neither by the silence nor consent of the accused; that the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory, and that the incompetence of the French tribunals as above stated exists always the same in every stage of the proceedings.

The same can be said as to the legislation of the Spanish-American Republics. It does not sustain the idea of Article 186. " Neither in the Argentine Republic, nor in Chili, nor " in Peru, nor in Colombia, nor in Costa Rica, is there any " law," observes Mr. Bayard, " that authorizes the punish- " ment of foreigners for offenses committed abroad against " citizens of those countries."

In conclusion, I wish to make another long quotation

from Mr. Bayard's comprehensive instructions to me on this important subject. After reviewing the legislation of other countries, the Honorable Secretary says:

"It has constantly been laid down in the United States "as a rule of action, that citizens of the United States can- "not be held answerable in foreign countries for offenses "which were wholly committed and consummated either in "their own country, or in other countries not subject to the "jurisdiction of the punishing State. When a citizen of the "United States commits in his own country a violation of "its laws, it is his right to be tried under and in accordance "with those laws, and in accordance with the funda- "mental guarantees of the Federal Constitution in re- "spect to criminal trials in every part of the United "States. To say that he may be tried in another country "for his offense, simply because its object happened to "be a citizen of that country, would be to assert that for- "eigners coming to the United States bring hither the penal "laws of the country from which they come, and thus sub- "ject citizens of the United States in their own country "to an indefinite criminal responsibility. Such a pretension "can never be admitted by this Government.

"It has been seen that Article 186 of the Mexican Penal "Code requires that the offenses included in the article "must be also punishable in the place of their commission, "and the proceedings before Judge Zubia, as set forth in his "decision, show that the Texas Penal Code was introduced "in the trial to prove that Mr. Cutting had committed the "offense of libel in Texas. With this Code before him, "Judge Zubia held that its provisions had been violated. "Thus, sitting as a Mexican magistrate he did what no "Texas judge could have done had Mr. Cutting been on "trial in that State for the alleged offense against its laws.

"By the Texas Code (sec. 2291) 'it is no offense to pub- "'lish true statements of fact as to the qualification of any "'person for any occupation, profession or trade.'

"But this is not all. By the fundamental law of the "State, no judge can convict any person of libel; for Section "6, Article 1, of the Constitution of Texas provides that 'in

"'all indictments for libels, the jury shall have the right to "'determine the law and the facts, under the direction of "'the Court, as in other cases.'

"These provisions render it wholly unwarrantable for "any judge, domestic or foreign, alone to decide that a per- "son has committed a libel under the law in Texas. Nor is "it shown that Judge Zubia even attempted to inquire as to "the truth of Mr. Cutting's alleged libellous statement."

I have made these copious quotations from Secretary Bayard's instructions, because it seems to me that his very able arguments are most convincing, and I could not well see a shorter method of placing the whole case favorably before your Excellency.

Before closing let me direct attention specially to pages 86, 87, and 88 of the report on "Extraterritorial Crime," by which your Excellency will see that the List of Codes enclosed with the communication of the Mexican Department of Foreign Affairs, under date of August 13, 1886, cannot be relied upon to sustain the claim set forth in Article 186, of the right of a nation to punish a foreigner for an offense committed against one of its citizens outside of its territory.

Also I would beg to direct attention to the remarks of the author of the same report respecting the opinions of publicists, like Fiore, Phillimore, Wheaton, Hall, Story, Bar, Field, Wharton, Sir G. C. Lewis, Heffter, M. Faustin Hélie, Pradier Fodéré and even President Woolsey, as well as others referred to on pages 92, 93, 94, 95, 96, 97 and 98 of the Report on "Extraterritorial Crime."

Finally, I wish to notify your Excellency that for all the above reasons my Government considers that the arrest, imprisonment, trial and sentence of Cutting, as well as the denial to him of the sanctions of justice recognized by all civilized countries, were violative of the rules of International Law, binding upon Mexico in spite of any domestic enactments conflicting therewith, and that therefore Mexico should be ready and willing to make all the reparation in its power by offering to pay the injured party an indemnity commensurate with the wrong inflicted.

I beg to renew to your Excellency the assurance of my highest esteem.

THOMAS B. CONNERY.

To His Excellency IGNACIO MARISCAL, &c., &c., &c.

Translation.

DEPARTMENT OF FOREIGN RELATIONS,
MEXICO, *February* 10, 1888.

MONSIEUR LE CHARGE D'AFFAIRES:

I have had the honor of receiving your communication dated the 13th of November last, in which, by direction of your Government, the case of the United States citizen A. K. Cutting, discussed in both countries more than eighteen months ago, is again considered. You commence by saying, that it will hardly surprise me that the discussion on this subject should be now reopened. In fact, it had come to my knowledge that, by order of the State Department at Washington, the questions regarding extra-territorial jurisdiction connected with said case were being carefully examined, and, consequently, there was reason to expect that some proposal might be made for the conventional arrangement of this matter, by means of a treaty through which both parties would modify the existing legislation in their territory. That would not have surprised me, whatever may have been the answer which I might have had to give in the name of my Government to such a proposal. But I candidly confess that it surprised me to see the discussion reopened with the twofold object of asking (or paving the way for asking) an indemnity in favor of the aforesaid Cutting, and of causing Mexico alone to reform her legislation, or rather that of several States of the Mexican Union, for the reason alleged that said legislation is contrary to International Law.

I shall not refer at present to the notorious character of the claimant, whom I designate as such because it is well known, that Cutting was the person who presented the claim which is now recognized, although without fixing its amount; nor shall I mention the filibustering projects with which that individual has been constantly threatening Mexico. I know,

that, if I did so, I might be answered, that, when the question is one of principles, no reference to persons should be made. Nevertheless, I cannot forbear saying, that, when a Government, such as that of the United States, decides to impart its protection to an individual under the circumstances which to-day characterize Cutting, it must be thoroughly convinced that justice is on his side; and then I must deplore, that such a conclusion has been reached; since, in the judgment of the Mexican Government, it lacks solid foundation. It is, however, to be hoped, as you observe, that, after the excitement caused (through accidental circumstances) by the imprisonment of Cutting has disappeared, the Honorable Mr. Bayard, giving his attention to the reasons we adduce and again examining the question, may be convinced that the two requests implied in your note could not be pressed further without violating the principles of justice and equity binding on all nations.

The same foundation underlies both requests, namely, the alleged opposition of Article 186 of the Penal Code of Chihuahua to the principles of international law. But, as the request relating to the indemnification of Cutting is also based on other reasons, and as it can be easily shown that the argument advanced with reference to said article cannot support that request, even admitting that the statute was contrary to the law of nations, I shall first discuss the particulars of the Cutting claim and then proceed to defend that part of the Mexican legislation against the unjust criticism made of it. I shall not do this with as many learned quotations as are contained in the report or book prepared in order to refute the article mentioned, and which you have pleased to deliver to me by order of your Government, stating now that it forms part of your allegations. I will not do so, because, I think proper to answer you without great delay, and, therefore, shall not have as much time as was at command to make that report. Fortunately, it is not necessary to enter into the details of that valuable investigation, and even admitting almost every one of its propositions, it could still be shown that there is no foundation to the charge made that the Mexican Legislator has infringed the rules to which, beyond dispute, all civilized countries should submit.

Returning to the request for an indemnity to be paid to Cutting, its principal foundation rests on the allegation that the Mexican Courts had no jurisdiction to try him for the libel of which he was the author in the territory of the United States. Further on we shall see, that they really had such jurisdiction, in virtue of a legislative provision of this country which is not contrary to the undisputed principles accepted by all nations, and, therefore, not subject to any valid objection on the part of a foreign government. Nevertheless, let us suppose for a moment, that there was no jurisdiction for the offense committed on foreign soil; undoubtedly, the court had it to try the accused for the circulation of the libel in Mexican territory, and Cutting was also tried on that account, as appears from the decision of Judge Zubia. Therefore, as the court had competency to try him on one, or the other charge, the foundation of the claim, which was want of jurisdiction, and which constitutes the principal allegation made, falls to the ground.

In the instructions given to you it is stated, that it does not appear anywhere, that the libel was circulated in Paso del Norte, nor is it shown that copies of the same were seized in conformity with the order mentioned in the judgment; but not much stress is laid upon this point, and with reason, for, to deny a fact affirmed in a judicial decision, and which, besides, was generally known at the place of its occurrence, merely because it cannot be found or is presumed not to be found stated in a certain form, would be going too far for the sake of discussion.

If, on the other hand, in the order of arrest issued against Cutting only the offense committed in Texas was stated, and not its continuation in Mexico, such action is explained in the sentence and is not unusual in the method of judicial procedure in this country. I do not deem it necessary to reply to these allegations, which seem to be made incidentally, and could not be thoroughly examined in this discussion. What cannot be denied is that the court founded its jurisdiction not only on the making of the libel in Texas, but also on its circulation in Chihuahua. If it be claimed that the former ground was untenable, such an assertion

cannot be made in reference to the latter, the existence of which is acknowledged, excepting the doubt, altogether inadmissible, that the printed libel had commenced to be circulated in Mexican territory.

To understand that the libel must necessarily have circulated at once in Paso del Norte, it is sufficient to know, that said town and El Paso, Texas, are close neighbors, practically forming one city, and that Cutting did not write his insults against Medina especially for the public of the latter place, who did not know the libelled person, but for the residents of the former, where Medina was well known among his countrymen.

The remaining arguments of the claim for damages consist of a series of complaints relating to the treatment received by Cutting in jail and at the time of his trial, complaints which were but partly presented before now, and of which the Government of this Republic had no knowledge. I cannot refrain from inserting here—because it has attracted my attention—what your note says on this point:

"Mr. Bayard (as therein stated) asked the release of Cutting on the grounds:

"First: That the judicial tribunals of Mexico were not competent" etc. (this refers to the question of jurisdiction, which we will afterwards discuss).

"Second: Because the sanctions of justice, which all civilized nations hold in common, had been violated by his treatment (that given to Cutting).

"Among these sanctions, it was stated, (these are as you copied), are the right of having the facts on which the charge of guilt was made, examined by an impartial court, the explanation to the accused of these facts, the opportunity granted to him of counsel, such delay as is necessary to prepare his case, permission in all cases, not capital, to go at large on bail, till trial, the due production, under oath, of all evidence prejudicing the accused, giving him the right of cross-examination, the right to produce his own evidence in exculpation, release even from temporary imprisonment in all cases where the charge is simply one of

threatened breach of the peace and where due security to keep the peace is tendered."

This passage of your note, which seems to have been taken from one addressed by Mr. Bayard to Mr. Jackson, then United States Minister in Mexico, and published after the occurrence of the events, contains expressions whose connection with the case I am at a loss to see, as also several charges of violation of rights which had not been notified to the Mexican Government asking relief or insisting on the liberation of Cutting. Referring to the last point, you affirm that the Honorable Secretary of State asked the release of the prisoner for the reasons you mention; so I must take it for granted, that these reasons induced him to take that step and not that they were those alleged to this Government when the demand was made; since it is well known that none were alleged at the time and that merely the laconic telegram was transcribed to the Government by Mr. Jackson, wherein his superior directed him to demand the immediate release of that citizen of the United States, illegally imprisoned, as stated in that message. The foundations which might then have existed for such a request, were understood by us afterwards, through deduction from conversations had with our Representative at Washington or from publications made there, for the purpose of informing the Congress of the United States.

Referring to the complaints presented to us in their totality up to the present on account of the supposed ill-treatment extended to Cutting, I shall recall that nothing was communicated to us in that regard until the 6th of July, 1886, when Mr. Jackson addressed me a note on the subject. He said therein that Cutting was confined in a dirty and unwholesome place, together with eight or ten criminals; that he had not been admitted to bail, and that the Consul was not heard on his behalf; wherefore, and in consideration of the danger threatening the prisoner's health, Mr. Jackson asked that Cutting's condition should be relieved without delay.

The answer to that note stated, that recommendation had

already been made to the Government of Chihuahua (as in point of fact it was done) to see that prompt and due justice be administered, relieving the material situation of the prisoner and granting him all the privileges of the laws. There is some difference between the statement made by the Minister of the United States at that time and what is said at present; because Mr. Jackson did not say that Cutting had been prevented from employing proper means of defence, having been denied counsel when applied for; that he was not informed of the evidence presented against him; that he was not permitted to give bail, etc.; as is now alleged in order to claim damages. This omission is of the greatest importance, because, if the resources which then might have existed were not exhausted, nor was any complaint made to the National Government, the latter could not be held responsible for the abuse committed, so as to demand damages for wrongs imputed to local authorities.

It will, however, not be necessary to make use of this consideration, because the principal one to be considered is, that all the complaints mentioned, of ill-treatment of the prisoner and opposition to his using the legal means of defence, are entirely gratuitous and calumnious; they are the work of the imagination and malice of Cutting, who, encouraged, from the beginning by the position which Consul Brigham assumed, refused to make any defence, alleging that he depended solely on his Consul and Government. Said Consul denied the possibility of judicially proceeding in Mexico for any act, of whatever nature, committed in the United States; that is to say denying all kind of extra-territorial jurisdiction. That absolute belief, that error, which goes further than what Mr. Moore concludes now from his investigation, that confidence in his knowledge of jurisprudence, without the necessary inquiry into the legislation of this country, caused Mr. Brigham to think that he ought to oppose every kind of proceeding whatever. In consequence, he made opposition in the name of the Government of the United States, which he said he represented at Paso del Norte, forgetting that the good offices a Consul is allowed to employ, widely differ from the powers of a representative or diplomatic functionary.

Cutting, on his part, seeing himself abetted in such a way, undoubtedly understood from that moment, that he might perhaps, in a future claim, derive some benefit from his supposed sufferings and voluntary or apparent want of defence. From that motive, although he had at first named the licentiate, José M. Barajas his attorney, soon afterwards, when he had already consulted with the Consul, he did not choose to to avail himself of the services of that lawyer, nor did he consent to appoint another, thus compelling the Judge to do so in his place. Neither did he ask to be released on bail, and he even expressly refused to give bail when it was offered him by order of the Supreme Court of Chihuahua; limiting himself to giving the same reply to every notification "that he only depended on his Consul and would only accept unconditional liberty." He and his Consul, through different motives, were not even willing, as it appears, that the want of jurisdiction, which they alleged should be discussed, as if, even for the denial of competency of any court, it were not necessary to employ all legal means, to have the accused present his reasons and to await the judicial decision in the form established by law.

That the conduct observed by both was such as has been stated, and that the want of defense alleged by Cutting was due to his malicious caprice, is shown by the report made by Judge Castañeda, which is annexed to this note and has not been sent to your Government before, because, as I have already said the complaints now specified against the proceedings of said magistrate were not fully known, and also because at that time the discussion of the case had taken a very different turn.

That report, given according to the facts set forth in legal records, contains an abstract of everything that occurred, and therein may be noticed the reasons (expressed in a more or less imperfect way, but entirely correct as regards their meaning) why the judge did not inform the Consul officially about the proceedings, as the latter demanded, apparently thinking himself a public functionary who, in virtue of international law or the terms of some convention, had the right to intervene in judicial matters. From the same doc-

ument it appears, that at the very commencement Cutting was informed of the charge and of the person who presented it, and likewise that he could employ counsel, which he did, as already stated. It further appears that the Judge sought to locate and actually placed him in the most comfortable apartment (or rather the least uncomfortable), which was also the healthiest in the jail, because he foresaw that, on account of that foreigner being concerned, there might be complaints on the subject. It there also appears, that the prisoner, after having applied to the Consul and being influenced by him, did not wish to answer the questions put to him, or, when he replied to any, he would refuse to attach his signature, considering himself under the exclusive jurisdiction of the Consul and his Government at Washington, practically enjoying extraterritoriality. And, finally, it also appears from that document, that he never asked his release on bail, and did not wish to accept it when offered to him.

As for the alleged cruelties practiced on Cutting during his imprisonment, I must add, that ever since that time they have been satisfactorily refuted, not only by the report I have just examined, but also by other evidence. Among the latter may be mentioned the telegram, already published, that was addressed to me on the 23rd of July by Consul Escobar y Armendáriz, and wherein, after stating that Cutting had refused to accept his liberty under bail, as decreed by the Supreme Court, the following is stated: "A window has been ordered to be opened in the room where the prisoner is kept, and he is to receive fifty cents per day for his meals, instead of ten, received by the other prisoners." These facts, witnessed by said Consul, who resides both at Paso del Norte and El Paso, prove that, if any distinction was made between Cutting and the other prisoners, it was in favor of, and not against, the former. Now, the only thing which can be required of a nation in such cases is that foreigners be not subjected to greater inconveniences than the natives, and not that it shall have special jails for strangers, better than those existing for its own people.

Even supposing that there were better jails for foreigners, many of them, especially individuals like Cutting, would

find them too uncomfortable and even dangerous for their health. A short time ago an ex-officer of the Mexican army, of the name of Rafael Pinal, was imprisoned at Laredo, Texas, and complained to this Department that he was shut up in a kind of an iron cage, cold and unhealthy, and that he was given unwholesome food. When the facts were known, it was ascertained that he was in the same jail used for all prisoners and received the same kind of food as the rest. Consequently the Mexican Government did not insist on the complaint it had transmitted to your Government at Washington on that behalf, understanding that there is no right whatever to demand in this particular any distinctions in favor of foreigners.

I cannot proceed further without referring to two special objections made by the Honorable Mr. Bayard against the sentence of Judge Zubia which decided the case. For that purpose, I shall translate the respective phrases contained in the instructions you are pleased to transcribe to me, that it may be seen whether I give them their right meaning:

* " Se ha visto (dice el Secretario de Estado) que el articulo 186 del Código Penal Mexicano requiere que los delitos comprendidos en él sean tambien castigables en el lugar de su comision, y los procedimientos del Juez Zubia, segun se refieren en su fallo, muestran que el Código Penal de Texas fué tomado en cuenta en el juicio para probar que Mr. Cutting había cometido el delito de difamacion en Texas. Con este

* " It has been seen (says the Secretary of State) that Article 186 of the " Mexican Penal Code requires that the offenses included in the article " must be also punishable in the place of their commission, and the proceed- " ings before Judge Zubia, as set forth in his decision, show that the Texas " Penal Code was introduced in the trial to prove that Mr. Cutting had " committed the offence of libel in Texas. With this code before him, " Judge Zubia held that its provisions had been violated. Thus, sitting as a " Mexican Magistrate he did what no Texas judge could have done had Mr. " Cutting been on trial in that State for the alleged offence against its " laws."

" By the Texas Code (sec. 2291) it is no offence to publish true statements " of fact *as to the qualification* of any person for any occupation, profession " or trade." * * * * * *

" Nor is it shown that Judge Zubia even attempted to inquire as to the " truth of Mr. Cutting's alleged libelous statement." * * *

código á la vista, el Juez Zubia sostuvo que sus disposiciones habían sido violadas; así, obrando como magistrado mexicano, hizo lo que ningun juez de Texas podía haber hecho, si se hubiera encausado á Mr. Cutting en aquel Estado por la supuesta infraccion de sus leyes."

"Por el Código de Texas (sec. 2291) no es delito publicar manifestaciones veraces de hechos respecto á la competencia de cualquiera persona para cualquiera ocupacion, profesion ú oficio." * * * * * *

"No se muestra tampoco que el Juez Zubia haya intentado siquiera averiguar si era verdad lo que se decia en la supuesta manifestacion difamatoria de Mr. Cutting."

Such is the first objection to which I refer. I will at once remark that the prescription of the Texas Code on which said objection is made, exists in a modified form in the Code of Chihuahua and Mexico (Article 613, § 2), as also in several other penal codes. In fact, the criticism, even if made in very unfavorable terms, of the competency of a person with reference to an occupation or profession, cannot be considered as an offense when it is founded on facts, at least when made through a sense of duty, or to benefit the public, as it is expressed in Mexican legislation. Therefore, if such had been the case, Judge Zubia would have had to find out, whether or not such circumstances existed in the statement published by Cutting against Medina. But that was not the case. Really it seems as if, when the objection was raised, the injurious words of the former against the latter were entirely forgotten. I quote them here literally as their author had them published:

"El Paso, Texas, *June 18th*, 1886.

"In a late issue of El Centinela, published in Paso del Norte, Mexico, (Cutting said) I made the assertion that Emigdio Medina was a 'fraud,' and that the Spanish newspaper he proposed to issue in Paso del Norte, was a scheme *to swindle* advertisers, &c. * * * Now, I do hereby reiterate my original assertion that said Medina is a 'fraud,' and add 'dead beat' to the same. Also that his taking ad-

vantage of the Mexican law and forcing me to a 'reconciliation' was contemptible and cowardly, and in keeping with the *odorous* reputation of said Medina." (Congressional Record, page 8401.)

Neither the vulgar or *slang* expressions of a "fraud" and "a dead beat" applied to a man, the second of which is to be found clearly defined in Webster's Dictionary, nor calling him the inventor of *a scheme to swindle* and styling his reputation *odorous*, in the sense of *ill-flavored*, can be considered as a criticism on his want of skill or his incompetency for any occupation, but, as calculated to injure his moral reputation independently of any profession or trade. Consequently, the argument used in attacking Judge Zubia is without foundation.

The other objection made against his conduct is expressed in these words:

"By the fundamental law of the State no judge can convict any person of libel; for, section 6, article I, of the constitution of Texas, provides, that *in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.* These provisions render it wholly unwarrantable for any judge, domestic or foreign, alone to decide that a person has committed a libel under the law in Texas."

This objection likewise seems to spring from want of recollection. Article 186 of the Chihuahua Code does not prescribe that, as far as the manner of proceeding or the class of tribunal that should determine the law and the facts is concerned, recourse should be had to the law of the place where the criminal act was committed, but merely, that such law should be consulted in order to ascertain, if it does or does not impose any punishment for said act; and when the national jurisdiction attaches, foreign legislation cannot be considered, except for such purpose as the national law may expressly provide. It seems unnecessary to elaborate this point, of itself plain enough.

I shall now examine the second request contained in your

note, and to the effect that Mexico should amend Article 186 of the Penal Code of Chihuahua and others of its States, because, as alleged, it is contrary to international law and, besides, such amendment would remove difficulties which might disturb the friendly relations existing between the two countries. But before entering upon this question, I must call to mind what has been the position I have been sustaining and continue to sustain in behalf of the Mexican Government. It consists in affirming that the extraterritorial jurisdiction established by that article, to judge foreigners for offenses committed outside of this Republic to the prejudice of Mexicans, and with the limitations therein specified, cannot in any way be considered contrary to the law of nations. As it is not necessary nor does this discussion require more than this, I have not endeavored to prove that the solution given in that article to the questions concerning extraterritorial jurisdiction is precisely the best of all these thought of, nor to show that in all particulars it agrees with the one adopted up to the present by the majority of civilized nations. It suffices for my purpose that said article is not opposed to uncontrovertible principles universally acknowledged by said nations; for, if that be the case, it cannot be pretended that Mexico is obliged to amend its legislation on the subject disputed.

When, in July, 1886, the case of Cutting was discussed, I thought that the theory sustained by the State Department at Washington strictly belonged to the *common law*, which teaches that all jurisdiction is purely territorial in its nature, and never personal, either on account of the offender or of the injured party. I had so inferred from several reports I received and from the general manner in which Mr. Bayard expressed himself in documents then published, and wherein he adopted Mr. Brigham's views on the subject. (Report of the Secretary of State, Congressional Rec., 8400, and annex No. 1, page 8401). In order to prove that said doctrine, however respectable it may be, is not the one that has served as the basis to many or to the majority of known legislations, and that sometimes it was abandoned as well in England as in the United States, countries where the *common law* prevails, I made several citations I thought per-

tinent, and sent to Mr. Romero a list of Codes, nearly all in force in different countries, which had established extra-territorial jurisdiction to judge its citizens in certain cases, and even foreigners in other instances, when, after commiting the crime, the offender was found within the country whose laws he had violated.

Now, however, I see by the words of the Secretary of State which you transcribe, as well as by Mr. Moore's report, which you have delivered to me, that your Government admits, as is natural, the jurisdiction over citizens who violate the laws abroad, but not over foreigners for the same cause, unless they should commit certain public offenses against the nation, such as attacking its security, counterfeiting its money or forging its bank notes. That is, really, what is found in the majority of the existing legislations; and as only the minority extends that jurisdiction to the punishment of offenses committed abroad by a foreigner against private individuals of the country, as done by our Article 186, the the conclusion is drawn that said article infringes upon international law, and therefore, Mexico is obliged to amend it.

It is scarcely necessary to recall the fact that the law of nations, binding on all of them, consists only of a limited number of principles in which they concur without exception, whilst there are numberless doctrines open to discussion and continually debated, awaiting their final sanction to be given by the civilized nations. Meanwhile every country is free to adopt one or the other extreme offered by those doctrines or a spirit which might reconcile them. Nobody is ignorant of the fact that the special legislation of each country does not establish international obligations, and that, although its concurrence with that of other nations may show the existence of a law of custom, that law only binds those nations who have agreed to obey it, or whose Governments in some way recognize that obligation. From the time of Grotius (De Jure Belli et Pacis, Book 2, ch. 8, § 2) these principles have not been denied; and in the course of the present note we shall see, that even what has been determined by special agreement of nearly all the civilized nations lacks the force necessary to bind those who have not approved

the agreement; a principle sanctioned as a matter of fact by the Government of the United States.

What is important in the present case is to know, that the great majority of nations has recognized extraterritorial jurisdiction; it being a matter of free judgment in each country, how far it suits its interests to carry it, provided the extent it may give to that jurisdiction shall not have been expressly condemned by the other nations in general as contrary to the rules which must govern their mutual relations. I mean an express condemnation, and not simply the adoption of other solutions or a different spirit on account of their having been considered preferable.

Well, then; the special jurisdiction to which I refer, that is to say, the one established by Article 186, already mentioned, with the limitations therein contained, has not been, up to the present, universally condemned; it has not been so stigmatized by any respectable authority, not even by one of those cited by Mr. Moore, and to which you call my attention in your note.

To show this I will only examine six or seven of the authorities you have referred to, alluding briefly to the others, in order to avoid prolixity and because that is sufficient for the object I have in view.

Heffter is one of the first of such authorities. He says the following: "Penal law is *territorial* and *personal* at the same time." He explains when it has one or the other character, and adds that the authorities are far from agreeing upon what he states respecting the second character. He then adds: "The greater number of criminal legislations go farther and authorize proceedings against foreigners, who outside of the territory, have rendered themselves guilty of crimes subversive of the security of the State and of its fundamental institutions. Heretofore it was admitted that the courts of a country were competent even to punish all crimes considered punishable in the interest of humanity, wherever they might have been committed, provided they should not have been tried already. The motive which has prompted the enactment of these prescriptions is to be approved, to wit, that each nation was under the obligation of

lending its aid for the repression of crime, no matter in what place it may have been committed. Nevertheless, so long as penal laws continue to present essential points of difference among themselves, their application to matters which may not have arisen under their dominion, shall always present serious inconveniences." (Public International Law, § 36.) If Mr. Moore makes a different quotation, taken from the 4th German edition, I quote from the 4th French, equal to the 7th German, edition, both of 1883, prepared and annotated by Geffcken.

What I have copied does not condemn the said doctrine of extraterritoriality as contrary to the law of nations. It merely alludes to the inconveniences to which it may give rise in practice, if applied in its greatest extent to all offences, even those of foreigners against foreigners and without the restrictions contained in the article I defend, which I shall discuss hereafter. Heffter does not treat there of the special question concerning offences committed by foreigners abroad against natives of the country. Furthermore, the same author, in note No. 4 of the passage quoted, says as follows: "There is always a great diversity of opinion between the authors on this vexed question (*sur cette matière épineuse*)."

Fiore, as we shall see further on, does not consider that the question is solved in an authoritative manner by the law of nations; he calls it a much controverted one and says that it involves grave problems. In the long passage from his "Private International Law," quoted by Mr. Moore, he merely criticises a doctrine of Pinheiro Ferreira, which exaggerates the right of a country to punish the foreigner who commits an offense abroad. From his "*Droit Pénal International*," wherein he treats this question at length, Mr. Moore only cites these words: "We cannot admit this doctrine (that of extraterritoriality founded solely on the right of protection) because we do not think that the extraterritoriality of the penal law depends on the condition of the person against whom the offense has been committed."

It would take too long to explain this author's system; but in order to understand that he does not condemn the

punishment of a foreigner, when he commits an offence abroad against a citizen, it is sufficient to quote this passage from the same work, § 66: "We shall conclude by saying that, in our opinion, there should be no difference established between the citizen and the foreigner in matters of jurisdiction or penal law. * * * We admit, therefore, the right of punishing indifferently every individual, *whether citizen or foreigner, when, through acts committed abroad* he has violated the laws that protect our institutions, *or infringed upon the rights*, be they of the nation, or of the persons who are *protected by our laws.*" It is true that, in order to avoid some inconveniences, he afterwards limits this right of punishment to certain cases; but that is because he wants extradition to be extended, so as to make it obligatory in all other cases possible, in such a way that the government of the offender may be compelled either to ask or accept his delivery in order to have him punished; a system not generally known in practice as yet. All this is explained at the end of Chapter III (No. 84) and in the second part of his work.

With regard to other writers mentioned by Mr. Moore, it may be safely asserted, if we merely consider what is quoted from them by that gentleman, that no one gives a decided opinion on the subject, excepting Bar, whose leading arguments we shall see refuted, and excepting also the American authors Woolsey and Wharton, to whose lucid doctrines I will hereafter allude more at length.

Phillimore refers to Fœlix in regard to what known legislations generally provide, and quotes an opinion expressed by Bartolus about the law which ought to be applied to a foreigner who commits an offence abroad. Wheaton likewise explains, at sufficient length, what is generally observed, and laconically approves it without discussing the question at issue.

Hall, as quoted in the report mentioned, says that "*the doctrine of non-territoriality of the offence is not at present accepted either universally or as generally as to make it authoritative in a fixed sense,*" whereby, instead of declaring it condemned beyond dispute, he acknowledges that it has many followers and respectable arguments for its support; because,

otherwise, the statement that it is not authoritative, in any sense, would be a superabundantly evident truth, or what in English is called a truism.

Story, in the citation made from him, without giving a decided opinion, states the doctrine of the *common law*, and ends by alluding to the opposing doctrine of Hertius and Voët. "The latter (he says) with some other foreign jurists, enters into lengthly discussions as to whether, if a foreign fugitive from justice is arrested in another country, he should be judged by the law of his domicile or by that of the place where the offence was committed. If any nation (he adds) should suffer its own courts to entertain jurisdiction of offences committed by foreigners in foreign countries, the rule of Bartolus would seem to furnish the true answer: *Delicta puniuntur juxta mores loci commissi delicti et non loci ubi de crimine cognoscitur.*" Thus, instead of declaring the extraterritorial jurisdiction at variance with international law, he supposes that there is a possibility of applying it to all offenses committed abroad by foreigners, even to those which do not attack the interests of the country or of its subjects; and he merely is of opinion, that in such cases the law *loci commissi delicti* should be applied, in conformity with the rule of Bartolus; that is to say, with what was ordained by the Penal Code of Prussia.

Mr. Field, as he himself remarks, only states in article 643 of his projected International Code what is provided by the French Criminal Code.

As for Pradier Fodéré, in the passage quoted by Mr. Moore, he merely presents some arguments in favor of the extraterritorial jurisdiction we are discussing, and before referring to others which are adverse to the same doctrine, says as follows: "*These remarks are certainly weighty;* but they cannot prevail against other considerations of no less weight." It is clear, that the doctrine in support of which that author finds remarks *certainly weighty* could not be considered by him as contrary to the established law of nations.

In respect to the distinguished American professor Theodore Woolsey, Mr. Moore, in spite of his skillful efforts, is unable to alter the sense of this passage: "From this expo-

sition it is evident (1) that States are far from universally admitting the territoriality of crime; (2) That those who go farthest in carrying out this principle depart from it in some cases, and are inconsistent with themselves: (3) To this we may add that the principle is not founded on reason and (4) that, as intercourse grows closer in the world, nations will the more readily aid general justice." (Introduction to the Study of Intern. Law, 4th edition, § 78.)

If President Woolsey, in another place (§ 20 *a*), criticises the tendency to punish every offence committed abroad without limitations of any kind (*punishing in any case*), even when it does not affect the interests of the nation, as when the victim is a foreigner, this does not mean that he has changed his opinion expressed in the passage already cited, nor much less, of course, to declare contrary to the law of nations the punishment, under certain conditions, of a foreigner who offends abroad a subject of the country and is afterwards arrested within its territory.

With regard to Dr. Francis Wharton, I cannot understand why Mr. Moore has cited him in support of his position, except that he wished that the Department of State might appear to be supported in this case by the jurist who bears the title and has performed, or still performs, the duties of its counsel or legal adviser. Mr. Moore quotes from that distinguished writer a passage taken from his work entitled "Conflict of Laws," 2d edition, of 1881. There the author, without denying its validity, refers to some inconveniences which might result from the theory that a sovereign, by virtue of his right to protect his subjects, should have jurisdiction to punish every one who injures them abroad. No one denies that this jurisdiction, if unlimited, (for instance, when the act is not punishable in the place of its commission) presents several inconveniences, which is also the case with the doctrine asserting the absolute territoriality of the punishment. Be that as it may, the passage quoted does not destroy the fact, that Dr. Wharton expressed, before and after 1881, most decided and peremptory views in favor of extraterritorial jurisdiction to punish foreigners guilty of offences against citizens.

The proof of this may be found in his book, "Treatise of Criminal Law," 9th edition, of 1885, where, in a long note to § 284 he uses the following language:

"The several theories of criminal jurisdiction may be classified as follows:

"I. *Subjective*, or those based on the conditions of the offender:

"1st. *Universality of Jurisdiction*, which assumes that every State has jurisdiction of all crimes against either itself or other States by all persons at all places. This theory has few advocates in England or the United States. It has, however, the high authority of Taney, C. J., who said in Holmes *vs.* Jennison (14 Peters, 540, 568, 596), that *the States of the Union may, if they think proper, in order to deter offenders from other countries, from coming, among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction.*"

Before going on with the quotation from Dr. Wharton, I must observe, that this theory, which he calls *universality of jurisdiction*, having in its support such a great authority as that of Chief Justice Taney, goes farther than that which is at the foundation of the disputed Article 186, since the latter does not punish *universally* offences committed abroad, but only, and with certain limitations, those *against Mexicans.*

Dr. Wharton continues to explain the theories on jurisdiction called by him subjective:

"2d. *Territorial Jurisdiction*, which assumes that each State has cognizance of all offences when the offender at the time of the offence was on its territory; but that it has jurisdiction of no other offences. This has been the prevalent English and American theory.

"II. *Objective* (jurisdiction) which assumes that each State has jurisdiction of all offences which assail its rights, *or the rights of its subjects*, no matter where the offender was at the time of the commission of the offence. This view, which appears to be the one best calculated to reconcile our adjudications on the *vexed question* before us, I have discussed at

some length in the Southern Law Review for December, 1878 (Vol. IV, p. 676). From this article I condense the following:

"The *real* theory of jurisdiction, as it is called by its advocates, rests, as has been seen, on the *objective*, rather than on the subjective, side of crime. *Jurisdiction is acquired, not because the criminal was, at the time of the crime, within the territory of the offended sovereign, nor because he was at the time a subject of such sovereign, but because his offence was against the rights of that sovereign or of his subjects. We punish all who offend on our own soil because our own duty is to attach to crime committed within our borders its retribution. But, in addition to this, we must punish, when we obtain control over the person of the offender, offences committed abroad, by either subject or foreigner, against our own rights.*"

This is sufficient for the present; but farther on I shall again refer to Doctor Wharton as an authority to defend the *real* or *objective* theory of jurisdiction, when I shall specially take up the defense of the article attacked, showing that it rests on a respectable scientific theory. For the present, what I desired to prove was that this learned jurist does not reject the doctrine to which I allude as being opposed to the law of nations. How could he reject it in this way, or in any other, when he defends it with so much skill, as appears from the work cited?

That reprobation is not made by any of the authors you refer to, nor by any other one known, not even by those who adopt in this important question a doctrine opposed to that upheld by Dr. Wharton, and to the more advanced one of Chief Justice Taney. The only one among those quoted by Mr. Moore, who ventures so far, is Mr. Requier, Relator of the Court of Cassation of France, who, in the case of Raymond Fornage, did in fact say: "The law cannot give to the French tribunals the right to judge foreigners for crimes or offences committed outside of the territory of France; that exorbitant jurisdiction would be violative of the law of nations." Such a singular opinion, however, was not adopted by said Court, although Mr. Moore indicates that it was.

The Court of Cassation declared the French tribunals incompetent, on the ground that the law of the country did not authorize them to take cognizance of the subject. This would have been sufficient as a basis for its decision. But, when it still further said, that the right of punishing emanated from sovereignty, which did not extend beyond the territory, thus seeming to approve the theories of its relator, these last sentences, having been unnecessary for the decision of the case, may well be considered as *obiter dicta* and, consequently, as lacking the authority which may be ascribed to that judgment. Be it as it may, the fact is that neither in these sentences nor much less in the essential foundations or in the part of the judgment containing the decision, was it declared that an opinion more favorable to the extraterritorial jurisdiction than that of Mr. Requier, contradicted the law of nations. (See the sentence in full in the appendix of Mr. Moore's report.)

The Court of Cassation could not have made such a declaration, because, when consulted by the Government about the same jurisdictional question, for the purpose of applying the principles of international law, and not the law in force, in order to modify French legislation, it made a report in 1845 in which it expressly said: "What is true is that the right of punishing in the name of French law can only be exercised in France; what is an error is to suppose that a punishable act can in no case be determined by said law." This amounted to a specific condemnation of the absolute territoriality of criminal jurisdiction, and established a distinction between the right a nation has to punish offences committed outside of its territory, and the moral or physical impossibility of applying the punishment while the offender is within the territory of another country; a very important distinction, because, as observed by a noted writer on criminal matters, the confusion of these two ideas generally causes the exaggerated adherence of some persons to the territorialty of punishment.

Apropos, and in order to show that the extension of the power to punish, as it is carried out in Mexican legislation, has found in France the most scientific authority for its sup-

port, before events either political or of a kind entirely foreign to the juridical character of the question, occurred to overcome the opinion of jurists, I will quote some sentences from the eminent Swiss professor, Mr. Charles Brocher. After inserting the words of the Court of Cassation, already copied, he says as follows:

"About twenty-four Courts of Appeal and six Faculties of Jurisprudence decided (in France) in a similar manner. A Committee was directed in 1849 to prepare a new bill, which was approved in 1852 by the legislative body. This bill, in general terms, invested French sovereignty with the authority to punish offences committed abroad against a subject, whenever the offender should seek shelter within the territory. As this resolution gave rise to complaints on the part of England, the Government withdrew the bill before it had been approved by the Senate." (Etude sur les conflits de législation en matière pénale. Revue de Droit International, tom. 7me.)

Here we see plainly, that, in this instance, the opinion in France was entirely favorable to giving a greater extension than that authorized by its laws to the jurisdiction called extraterritorial, and that the Government, only for reasons foreign to the juridical question (as is confirmed by other historical data), and only in consideration of its foreign policy at the time, withdrew the bill, which on that account did not become a law.

All this proves, that said question has not been finally settled in France, although its legislation for the present may only authorize the punishment, in the case under discussion of certain specified offences. Besides, it would be difficult to be convinced, that so many experienced and learned jurists and magistrates should not only make a mistake on that occasion, (which was possible), but, that they should adopt opinions at variance with the well-established principles of international law.

Let us refer now to other nations. Great stress is laid in Mr. Moore's report on the provisions of the Penal Code of the German Empire, which Code had the effect of restricting the

legislation of various German States in the part favorable to extraterritorial jurisdiction. This induces me to make two brief observations: In the first place, scarcely had sanction been given to this Code, put in force throughout the Empire by statute of the 15th of May, 1872, when it became the subject of several controversies, and amendments to it were proposed, until it was partially reformed in 1876. Among the reforms proposed in the respective bill was one for the purpose of subjecting to the Courts of the Empire foreigners who had committed abroad crimes and offences against German subjects. "The Reichstag," it is said, "did not think that the time had arrived for revising the whole difficult theory of the application of penal law, and merely adopted the new provisions, the necessity of which seemed to be indicated by the circumstances." (Annuaire de Législation étrangère, 1877, p. 139.)

These facts mean, that intelligent opinion has not been settled in Germany, on this particular question, by the Imperial Code, and there has been subsequently a tendency to make exterior criminal jurisdiction even more extensive perhaps, than that authorized by the laws of Mexico, since the latter comprise some important limitations thereto. They also mean, that the doctrine which gives a greater scope to extraterritorial jurisdiction and which belonged to the different German Codes substituted by that of the Empire, has not been eradicated in that country as contrary to international law, which is based chiefly on reason and not on written law.

Now that I speak of the German Code, it may not be out of place to quote some remarks contained in an able investigation of the matter published in a French review. After stating that said Code declares that the Courts of the Empire are competent to judge a great number of crimes committed by Germans outside of their country, it goes on to say:

"Foreigners, on the other hand, cannot be prosecuted for criminal acts committed abroad, except when they constitute a crime of high treason against the German Empire or against one of its States, or the crime of counterfeiting coin. * * *

"We notice, in that particular, in the penal code under consideration, an omission which has for its consequence, that the interests of citizens abroad are not sufficiently protected by the German Law, and that the perpetrator of a crime or offence committed abroad against those very interests, could, provided he is not a German, seek refuge in Germany, where he could not be prosecuted. * * * The protection a State is bound to impart to all the members of the nation, whether within its territory or abroad, would be incomplete if the laws of the country were powerless to strike, within its own territory, a foreigner who has committed, in another country, an offence against the citizen. The fact such an individual was not subject to the penal law of the State, would disturb and trouble society." (Etude sur le Code Pénal d'Allemagne. Revue de Droit pratique, 1874.)

These extracts give an idea of the objections which, in relation to the difficulty, have been made against the German Penal Code.

With regard to Italy it is proper to remark that Mr. Moore, in the list of Codes he inserts (page 87), supposes that there is only one—of the year 1859—in force in the whole of that kingdom and substantially like that of Austria. In reality there are two Codes in force in that nation: the Sardinian Code, of the year mentioned, and that of Tuscany, observed within the territory which formerly was the Grand Duchy of that name. By the latter every citizen or *foreigner* who commits an offence abroad against a Tuscan is equally punished (Articles IV and V, § 2), the penalty being somewhat lighter for an offence committed outside of Tuscany, and it being necessary in those cases, that the act should also be punishable by the law of the place where it was committed (Article IV, § 2, and Article VI). The text of the law may be seen in Fiore's work already mentioned, Nos. 210 and 211, and thus the concurrence of that European Code with the Mexican may be noticed. It is not strange that Mr. Moore should have committed this error, since Fiore himself, in his general review of legislations, says (No. 193), that, after having consulted among other American Codes the Mexican

of 1872, he did not find therein any provision referring to offences committed abroad, that is to say, he did not find it in the Chihuahua Code, which contains Article 186, now so fiercely attacked on account of those provisions.

As for the new Italian Penal Code, not yet in force, the first book of which was approved by the Chamber of Deputies in 1876, I have observed on a former occasion, that it contains provisions very similar to those of Article 186 of our Code. If it has not been enacted yet, it is apparently not because, as is hinted, objections were made to what had been approved, but on account of the criticisms relating to the remaining provisions, and especially to capital punishment, which is contested in Tuscany.

The extraterritorial jurisdiction to which we refer was established with regard to foreigners committing offences abroad against Italians, not only in that project, but also in three different and well-matured ones, which had preceded it, having commenced to be formed since 1868. Fiore reports it in the following manner: "As to the case of a foreigner who may have committed, beyond our frontiers, an offence against one of our fellow-citizens, the right of punishing the criminal was admitted *in the four projects*, provided he should be found within our territory." * * * (*Ibidem*, No. 176.) This uniformity in four different projects, the result of careful investigation, shows clearly what has been the ruling opinion in Italy on the subject I am discussing, even though that opinion has not up to the present been sanctioned as a law.

Without pretending to refer to all, nor even many, European countries whose authors and jurists, if not their actual legislation, extend territorial jurisdiction beyond the arbitrary limits fixed thereto, I shall briefly speak of Spain, to whose positive law Mr. Moore alludes as restricting, according to the more general custom, this class of jurisdiction. Among the authorities who state what has been there the scientific opinion on the subject, I shall first quote Riquelme, the best known of all Spanish authors on international law: "In the second case (so he expresses himself), that is to say, when a foreigner comes to reside in a country,

after committing an offence against it or one of its citizens, * * * the position is different, because the foreigner has not infringed the laws of the country whilst within its territory; he has done wrong to the State or to its citizens, but not after having entered into the obligation of respecting it, because this duty begins when the foreigner enters the territory, and not before."

"But, notwithstanding the difference between this case and the former, the best jurists agree in the opinion that the foreigner is not only liable to be tried, but that there exists the right of asking the extradition of the criminal under certain circumstances. This doctrine is based on the undeniable duty every Society has to defend itself and to prosecute those who assail its existence, and on the unavoidable obligation it also has to protect its subjects. From these duties and obligations, which are essential to the laws, springs the right of inflicting penalties on those who assail the safety of the State or of its members; and this guarantee of society would be inefficient in many cases if the principle of territorial limitation of jurisdiction were carried out so strictly that only those should be tried who might infringe the laws within the country where they are in force. (Elementos de derecho público internacional, by Don Antonio Riquelme, Book 2nd, title 2nd, chapter 2nd.)

Señor Don Alejandro Groizard, a distinguished legist and diplomate, in his reception address delivered at the Academy of Moral and Political Sciences of Madrid in the year 1885, made use of the following language: "If extraterritoriality can and must arise from the condition of the criminal, it can and must also arise from the condition of the offended. The motive is the only thing different. In the former case the arm of the law reaches the culprit. * * * In the latter (the condition of the offended party), the law makes its power to be felt upon the criminal, as a result of the protection it everywhere imparts to all registered under its flag. The principle extends even to foreigners, because it is not conceivable that, after having become guilty of an offence against a citizen, the protecting law of the latter should permit the former to enter within its range of action to offend

anew by his presence and impunity." The foregoing is sufficient to prove, that the opinion of learned specialists in Spain is more advanced, as far as extraterritoriality of criminal jurisdiction is concerned, than the legislation there in force, and that for the same reason the question cannot be considered as solved in a definitive manner in the Spanish nation.

All this shows, in my opinion, that the problem of limitations to be given to the jurisdiction called by some quasi-territorial, and which is the one established by said Article 186, cannot be considered solved in a final and decisive manner even in the countries whose legislation does not admit it, or only admits it for certain cases, so that its solution constitutes an axiom of the law of nations. Now then; if it is not an axiom universally recognized, that every step beyond the limits reached by the majority of States in regard to this subject, violates the rights of the remaining nations, I cannot conceive, why the country which takes that step, especially if some others do the same, should be obliged to recede acknowledging, against its own convictions, that it has been mistaken. If it were necessary that every statute, relating to a debated matter of international law should conform to the majority of the legislations adopted by other countries even the slightest progress would be impossible, until there was an agreement concluded with the majority of nations, a proceeding almost impracticable.

In order to fully demonstrate, that the question relating to the jurisdictional limits of a country is far from being finally settled by the mere fact that the majority of nations do not extend those limits as far as Mexico, I shall content myself with inserting some remarks of the same Fiore, whom I have quoted so many times for the reason that Mr. Moore seems to give him the preference, because, in his monograph on the subject, he advocates the customary limits of said jurisdiction, although, on the other hand, he extends the sphere of extradition. "The diversity of opinions," says that notable writer, "begins to show itself when an attempt is made to decide in what sense the penal law should be considered as exclusively territorial. Should we admit that

every criminal act committed beyond the frontiers must *de jure* pass unnoticed by the law, or rather that it is applicable to the individuals who have come to reside in the territory, having previously committed an offence abroad? *In the solution of this difficult problem there are not only great differences of opinion among the authors, but also between the systems sanctioned by positive legislation.* * * *

"The larger number of authors are of opinion that in principle, the jurisdiction of a penal law cannot be restricted in an absolute manner to the territorial limits of the State. * * * But, when the cases are considered in which the extraterritorial authority of penal legislation should be admitted, the application of the national law to the offences committed abroad, then an agreement in opinion becomes difficult. We propose (he further says) to discuss *this disputed question* and to try to establish the general principles serving to fix the limits to which the extraterritorial authority of penal law should be restricted." (Traité de Droit Pénal International, Nos. 3 and 4.)

The foregoing, stated by Fiore in the very work in which he states what has been established for the present by the majority of legislations in force, shows that the author proposed to treat a question still open and pending, and that the subject upon which he wrote has not been settled, as is pretended, as a principle of law binding on all nations.

This may even be inferred from the report inserted by Mr. Moore of what occurred in the "Institute of International Law" when the question relating to extraterritorial jurisdiction was discussed at Brussels in 1879, because the special jurisdiction referred to, and which Mr. Brocher called *quasi-territorial*, was the subject of much debate, having been rejected then, as is asserted, by seventeen votes against nine. But, notwithstanding that vote, the question was postponed for future deliberation. The subsequent session of the Institute took place at Munich in 1883, and, although there was another discussion and a vote on the same general question, the votes to which Mr. Moore refers, and that were not directly taken on the complex doctrine upon which said Article 186 is based, cannot be considered as decisive. They did not put

an end to this most serious controversy, which has divided jurists since the Middle Ages, as Paul Bernard remarks in his modern Treatise on Extradition (*Traité de l'Extradition, Part 2nd, Book 3d, sect. 2nd*). It seems to be plain that the Institute did not consider as decisive and final its votes in regard to this difficult subject, because subsequently it specifies, among the questions still under examination, those *on conflict of penal laws* (Revue de Droit Intern., Vol. XII, p. 616); and the subcommittee which reported on the subject at Munich is now established as a permanent committee on this point and on extradition. (*Idem*, Vol. XVIII, p. 514.)

Now then, if the jurisdictional question to which we have made reference is generally considered as open to much controversy, and if, according to the best authorities, it comprises several problems of a very difficult and troublesome character, how is it possible, that the fact of adopting one of the various solutions given thereto, even though it be not sanctioned by the majority of legislations, should constitute a breach of international law?

Besides, that law does not recognize for its source the legislation of a few or many countries. No public writer of notability mentions positive legislation among the sources of International Law. Wheaton, speaking of positive legislations, only considers as such sources the laws of particular States regulating their service of cruisers and their prize courts; and Ortolan, not the writer on criminal law, but the author of "*Diplomatie de la Mer*," expresses himself in this manner: "Finally, besides the public treaties and the customs of nations, there is another source to which we must recur in order to complete our knowledge of international law, to wit: the laws and ordinances issued by the Government of each State to regulate the conduct to be observed by its subjects in certain special cases, in which the interest of said government might be in conflict with that of other nations. *The law of nations is not derived from these ordinances and laws;* on the contrary, the latter really emanates from the law of nations, and ought only to be its application; but on that very account their knowledge is indispensable." (Book I, Chapter IV.) The legislation of the dif-

ferent countries may be a means of understanding the law of nations; but it does not fix the latter, nor determine its obligatory character in regard to international relations.

The best proof that the solution given by the majority of nations to a disputed point cannot be binding on an independent nation, is given to us by the United States Government itself. It is well known, that the declaration of Paris, made in 1856, that privateering should be entirely abolished, has been subscribed already, besides the seven nations who orginally agreed to it, by others whose number amounts to forty, or what is the same, by almost all of the European nations (Spain being, perhaps, the only exception), and likewise by all those of America excepting the United States and Mexico. Here we have a majority of civilized countries much larger than the one alleged in our discussion; and here we have also a much weightier subject. Furthermore, the condemnation of privateering by authors and philanthropists is uniform. Among these one of the most distinguished is Franklin, who negotiated in the name of your country the first treaty by which that practice was condemned, that made with Prussia in 1785, and renewed some years later, but with omission of the stipulation to which I refer. Your Government, however, has not thought (nor does the Mexican Government think), that it is obliged by international law to acquiesce in what subsequently was agreed to by the majority of States. The reason seems to be, that in the matter referred to, although a certain decision has been arrived at by a large number of Governments, for their private regulation, neither they nor all the publicists have declared, that another solution, given in a different sense, would be contrary to international principles, as Dana implicitly remarks (note to Wheaton's International Law, § 358); and therefore, the declaration of Paris has not become a binding rule of law for every civilized nation. On the contrary, any one of those who have not assented to the declaration above mentioned is free to resolve the question according to the notions it may entertain of its private interest.

It does not matter, therefore, how many are the penal

codes in force in other nations, which may have restricted extraterritorial jurisdiction more than in Mexico, nor how many of them go in that particular at least as far as the codes of this Republic. In truth, it is of little importance to know that; but I cannot forbear observing that Mr. Moore exaggerates the paucity of the latter number, when he says that only two countries, Russia and Greece, agree with the Mexican Republic on that point.

The codes of those two nations go even farther, because on this subject they do not establish the limitations of the Chihuahua Code. The same is the case with that of Hungary, which is distinct from the Austrian Code. The latter, provided only that extradition is offered and not accepted, punnishes every foreigner who commits an offence abroad. Sweden and Norway, in their two separate codes, go likewise farther than the Mexican in recognizing this right, although they make the exercise of the same depend, in each case, on the will of the King. Undoubtedly, they do not consider that the right springs from his will, but they rather suppose its existence and confine themselves to make use of it as it may suit their convenience, which is determined by the sovereign.

Furthermore, there are other European codes, more advanced on this point than the Chihuahua statute. One of them is the Code of Tuscany of 1843, of whose provisions and present validity in a portion of Italy we have spoken heretofore, remarking that for the punishment of an act committed abroad, it requires the same condition as the Chihuahua Code, namely, that the act may also be punishable by the law of the place where it was committed. Even without such requirement those acts are punished by the respective codes of the Swiss Cantons of Fribourg (Article III, § C) and Tessino (Article V). Summing up the codes I have just mentioned, we see, that there are in Europe nine at least in force which go as far as Mexican legislation has gone, if not farther, with reference to jurisdiction over foreigners for acts committed outside of the territory. For the present we do not speak of America, but shall refer to its laws a little later.

It being shown, as I think it is, that Article 186 of the Penal Code of Chihuahua does not infringe upon the international law binding on all countries, it would seem useless to enter into speculative reflections regarding its foundations. Nevertheless, as in the instructions from Mr. Bayard quoted by you, and in the printed report you handed to me, several arguments of that kind are used for the purpose of attacking the same, it will not appear strange that I defend it in a similar manner. I shall do so as briefly as possible and at least with a view to vindicate the name of the jurists who prepared the code, and whose memory, far from suffering, will gain by the examination of the subject.

It is often repeated that the jurisdiction of a country emanates from its sovereignty, and that the latter never extends beyond the national boundaries. It may be conceded that the jurisdiction of a State, whether civil or criminal, has no other origin than the sovereignty of the same, and that the latter is territorial in the sense that it cannot give rise to material acts except within its territory; but this in no way signifies lack of the right to exercise it against the person who from abroad offends the nation or one of its subjects. The right belonging to a State to defend and protect its own people does not cease when they happen to be temporarily under another jurisdiction; then the only thing wanting is the possibility or expediency of exercising that right, and these begin to exist from the moment the offender comes to submit himself to the power of the nation that has been attacked, whether collectively or in the person of one of its members.

Ortolan, the distinguished author on criminal law, who carefully discusses this question, says as follows, in his *Eléments de Droit Pénal:*

"In vain the objection is made, that the exercise of the internal sovereignty of each country stops at the boundaries of its territory; as we have just explained, the purpose is not to go and execute in the house of another an act of sovereignty; but to exercise in our own house, within our own territory, the right of punishing with which we are invested." (No. 885.)

"It is sufficient," says Carrara, another very respectable writer on the subject, "to extend our vision, without stretching out our arm, over the neighboring country."

It does not seem logical to admit the right established in the majority of legislations, of punishing the foreigner who has attacked abroad the security of the nation or its collective interests, thus recognizing extraterritorial jurisdiction as dependent on the right of defending itself, which belongs to every State, and then to deny the same jurisdiction when it is dependent on the right which likewise belongs to a nation of defending its citizens. Still less logical is it to recognize the right to impose penalties, in similar circumstances, on a foreigner who counterfeits the money of the country or the bills of its banks outside of its territory, for in these cases the nation has not been attacked in its collective form, but rather a large number of its members have been injured thereby. The jurisdiction of a country cannot depend on the fact, that the number of those injured is large instead of being small; it arises undoubtedly from the right it has to defend and vindicate either many or only one of the individuals belonging thereto. The legislators who limit the exercise of such quasi-territorial or objective jurisdiction, abstain, for reasons of convenience, of which each nation is free to judge, from the unquestionable right that exists to establish it in a broader manner; but this abstention proves nothing against the existence of said jurisdiction in as ample a form as reason accords.

The origin of the right to punish has given rise to various opinions, and, in order to explain it, numberless theories have been framed. Doctor Wharton, following the German authors, divides those theories into two classes: first, the *relative* ones, which comprise those of revenge, of utility and of social convention or contract; and second, the *absolute* or abstract ones, founded on the innate notion of justice. Ortolan proves, with profound reasoning and unequaled clearness, that all those theories are incomplete, and that, if we think of our double nature, spiritual and material at the same time, requiring satisfaction to the moral sentiment, in-

herent in every human being, and tending, at the same time, to derive practical utility from our acts, we shall find that the true theory, the one based on common sense, is the theory which asserts, that the right to punish claimed by every community should be founded on intrinsic justice combined with social utility. This opinion, though explained in a different way, is also the one advanced by cited American writers on criminal law, and by the no less estimable Professor Woolsey.

This was also that adopted by the commission intrusted with the formation of the Mexican Penal Code in 1871, and which served as a guide for their multifarious and important propositions. It was so stated in the *Exposé of Reasons* for their projected code; and, invoking this doctrine, although without analyzing its application to the subject, they adopted the provisions contained in the disputed Article 186, as may be noticed from the portion thereof inserted in my note of August 12, 1886, addressed to Mr. Romero. Very concisely could said theory be applied to the case in question, observing that, if the act committed by a foreigner abroad amounts to a violation of moral law, *malum per se*, as must be the case when it is punishable both by the laws of the country where it was committed and by those of the nation where the delinquent seeks shelter, there exists intrinsic justice for his punishment in either country; and, if said act injures a native of the country of refuge, there is, besides, on behalf of the latter, the expediency of trying and convicting him for all the utilitarian purposes of punishment. Thus, there exists in this latter country the two elements required to make the right of punishing unquestionable.

"The greatest scruple which may remain in the depths of the mind when these problems are discussed (says Ortolan, the criminal writer), against the application of the penal laws of a country to offences committed abroad, especially if the offender is a foreigner, consists in the fact that frequently it might happen, that the latter might be punished by virtue of laws he does not know, either in regard to their text or to their very existence, and that the maxim that 'No one is supposed to be ignorant of the law' cannot rationally be ap-

plied under such hypothesis. But * * * (the author here refers to some other explanations given by him) the guilty foreigner, when he commits a crime against an individual of another nation, may be ignorant of the precise provisions of the penal law of that nation; but he undoubtedly knows, through his own conscience, that he commits a criminal act deserving punishment. Should he be in doubt, he could, before acting, inquire about the provisions of the law to which I refer, the same as if he entered into a private contract, the purchase of some real estate situated in the country of that person, he would take good care to ascertain what is the law of the nation of the other contracting party about capability for contracting and the transfer of such property. And, furthermore, since he can only fall under the authority of the law and the repressive jurisdiction of that State, when he goes to it and is there arrested, he can, before coming to alarm the community and exposing himself by his presence within the territory of the country to which his victim belongs, make inquiries about the penalties he might incur for the offense committed against one of its citizens." (*Eléments de Droit Pénal*, by Ortolan, 5th edition by Desjardins, professor of Penal Legislation of the Faculty of Paris, year 1886, § 903.)

I have made this long quotation, because I consider it conducive to the general defense of Article 186 of the Chihuahua Code. But we must not forget, that said article contains a provision which makes even more evident the justice with which it authorizes the punishment of a foreigner who has committed an offence against a Mexican abroad, namely, the requisite that the act for which he is tried should also have a penalty affixed in the country where he committed it. This constitutes an additional guarantee, that punishment will not be inflicted for an act executed under the belief that it was harmless. I call it an additional guarantee, because in regard to offences against private parties the laws of civilized States are generally in accord as to the facts constituting the same, unlike the case of offences that we might style crimes against the national interest, such as an attack on the national institutions, with regard to which, however, extra-

territorial jurisdiction is generally admitted, notwithstanding that in such cases the same universal convenience of repressing the crime does not exist.

Doctor Wharton (*ubi supra*) expresses ideas similar to those of Ortolan, or at least having an identical object, when he says: "Two objections, however, may be made to the *real* theory of jurisdiction: The first is that it renders foreigners liable for disobedience to a law with which they are unfamiliar. But, if this objection is valid it would relieve foreigners intraterritorially as well as extraterritorially. If a foreigner can set up the defense of ignorance of our laws abroad, he can set up the same defense on our shores. * * * But in point of fact no such defense can be set up. * * * In other words, the presumption of knowledge of the unlawfulness of crimes *mala per se* is not limited by State boundaries. The unlawfulness of such crimes is assumed wherever civilization exists."

Doctor Wharton then states the second objection he speaks of, and I shall copy what he says in reference thereto, because it answers one of Mr. Bayard's observations: "Another and more serious objection (these are his words) is that the real theory assails the prerogatives of sovereignties. To this may be replied that the objection proves too much. If a foreign sovereign has exclusive jurisdiction over his own subjects, then we cannot, under any circumstances, punish the subjects of a foreign sovereign. But this, no one, even among the sturdiest advocates of the personal theory, pretends. It is conceded on all sides, that the moment a foreigner sets foot on our shores, we hold him liable to our penal system in all its details. Nor is this all. There is no civilized State that has not passed statutes making it a criminal offence, punishable in its courts, for foreigners, even in their own countries, to forge its securities." * * *

By this last remark Doctor Wharton shows the inconsistency, which I have called anti-logical, of punishing certain offences committed abroad by foreigners against the State or against many of its citizens, and at the same time denying the authority of doing so when the injured parties are a few

or only one, as if the right could vary according to the number of those with regard to whom it may have been assailed.

"We do not, it is true, attempt to arrest them in their own land (adds the skilled adviser of the State Department); we are restrained from making unconditional arrests by the countervailing principle of the inviolability of the soil of foreign States. But, when such offenders come, voluntarily or involuntarily, within our borders, we try them as justly subject to our laws on the ground that they have criminally assailed our rights."

In conclusion, Dr. Wharton, in the place quoted, refers to another difficulty opposed in his country against objective jurisdiction—a difficulty which is apparently caused by the sixth amendment to the Constitution of the United States. On this point I have nothing to say; because, even if the objection were not, as it seems to be, well answered, and even if it were unanswerable, it is plain that, what the Constitutiou of the United States prescribes, as well as what the Constitntion of Mexico might prescribe if it treated of the subject, could not serve as a rule to solve an international question or one dependent on the principles of the law of nations. The fundamental law of a country, which, by virtue of its sovereignty, decides its domestic questions, lacks the authority necessary to define international affairs.

I will finally add a very obvious reason that exists for the establishment of the right to punish a foreigner who comes into our territory after having offended one of our citizens abroad. "It is a received maxim of international law (says Phillimore) that the Government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it." (Intern. Law, Vol. I, page 233.) If, then, the State has the right to impose conditions for the admission of foreigners, one of them might be that, upon entering the national domain, they shall be bound to answer, according to the laws of the country, for the offences they may have committed abroad against its citizens.

But, I must repeat that, if I present these arguments in favor of the solution given by the Mexican Penal Code to

the difficult problem of extraterritorial jurisdiction it is not because I consider myself compelled to do so in the present discussion. All that for the moment has to be done is to ascertain, whether that solution, from the mere fact of its not being in accordance with the majority of known legislations, constitutes a violation of international law. I have said enough already to prove that this question cannot be answered affirmatively.

Another reason is also adduced for the request that Mexico should alter her legislation on the point disputed and make it identical, as has been proposed, with that which is in force in other nations. This reason is the promotion of good neighborhood and friendly relations with the United States, by removing, it is said, a constant menace for the good understanding with that Republic. Truly, if such was the case and if certain circumstances did not intervene to render that step (supposing for a moment its practicability) not only useless for the purpose alleged, but indecorous for an independent State, the Mexican Government would hasten to comply with the request made; because it appreciates very highly the importance of preserving and rendering closer those friendly relations. But it is not credible that with such a condescension the real and perhaps only menace for the harmony existing between the two countries might disappear, to wit: the spirit of speculation and adventure which characterizes certain men like Cutting, sometimes to be found in your country, just as in ours, there are certain evil elements easily worked upon by those Americans, who, although few in number, dream of acquisitions in some way or other, at the expense of a neighboring and relatively weak nation.

A triumph obtained after the outcry raised by those people, far from satisfying or quieting them in the future, would rather serve to stimulate their appetite for notoriety and profit obtained by means of claims presented, if not by projects of filibustering. I am alluding to the two requests of your note, united as they are *de facto* and in their origin, one to procure an indemnity for Cutting, and the other causing us to repeal the legislation which prevented him

from defaming a Mexican with impunity on the boundary of the two countries.

Another of the effects resulting from the indemnification of Cutting, or the abolition of the laws, through his conduct, stigmatized as contrary to international law, would be to deeply wound the patriotic feeling of the Mexicans, who would not be able, in general, to understand the technical reasons alleged for so doing, while they have understood and felt the injurious reflections made against their country when the disagreeable incident occurred.

In our opinion, the fact that our laws or those of Chihuahua punish real delinquents injuring Mexicans in the United States, the same as if they had done so in any other foreign nation, is not a menace threatening the good relations between the two Republics. The generality of the people in both nations do not understand technical questions about jurisdiction and even seem to disdain those controversies started rather by persons presumptuous of knowledge or with little prudence, like Consul Brigham. It was he who, perhaps inadvertently, stirred up among the Texans the elements of disorder and international disturbance which immediately began to appear under the pretext of the Cutting question. I refer principally to the scandalous meeting against Mexico, then held at El Paso, and to the challenges made on that account against this Republic by a small portion of the American press.

While that popular meeting showed the danger with which a behavior like said Consul's may threaten the friendship between the two countries, the other meeting held immediately afterwards and in the same place by the better class of the population, as well as the general attitude of the press in the United States on such a critical occasion, showed that the good sense of the American people is not prejudiced (at least, so we understood), by jurisdictional questions which practically tend to allow certain offences to go unpunished or to serve as pretexts for claimants alleging to have been injured.

In our opinion, the best indication that the people of the United States will not feel displeased on account of Article

186 of the Penal Code of Chihuahua remaining in force, nor even if it is again applied to an act occurring in that country, since in so many years it has but once been enforced against an American; the best indication that there exists no such danger, is something that took place a few months after Cutting's imprisonment. It then happened, likewise at El Paso, Texas, that an individual defamed through the press a Mexican, also of Paso del Norte, where he was imprisoned, as Cutting had been, the only difference between the two cases being, that in the second the libeler was a Spaniard in place of being an American; a circumstance which ought not to have prevented a protest against the jurisdiction exercised, because, according to the territorial theory of punishment, the slanderer should have been subjected to trial by the El Paso courts. But there was not a single voice raised in that city to protest, and the Board of Trade, consisting of the most honorable persons, held a special meeting to which the Mexican Consul was courteously admitted, in order to devise, by agreement between the residents of both towns, some expedient to check the audaciousness of libellers, who avail themselves of the facility to cross the boundary at those neighboring places to insult with impunity even their most respectable residents. The report annexed and the inclosed cutting from "The El Paso Times," both of which were sent by Consul Escobar y Armendariz, show what was the spirit of that meeting, not in the least unfriendly to Mexico on account of the new application of Article 186, but rather in favor of its provisions.

In order to persuade this Government to change the laws in force in Chihuahua and the greater part of the Republic with regard to extraterritorial jurisdiction, you are pleased to recommend in your aforesaid note, under instructions from Mr. Bayard, that Mexico should follow two examples cited as most opportune. The first is the case of McLeod which occurred in 1842 and in which, as you state, the United States Government, in reply to the request made by the English Government to release the prisoner, who was under the custody of the authorities of New York, was compelled to acknowledge that the Federal authority had no

right to intervene in the case, and thereupon Congress amended the law regulating writs of *habeas corpus* in order to facilitate for the Executive compliance with its international obligations. In that case the answer of the American Government, as you assert, was not different from that given by the Government of Mexico to the request for Cutting's release, "but the United States made all haste (you go on to say) to conform its municipal laws to its international obligations."

As may be inferred from the above, what the United States did at that time, was not to change its legal prescriptions about jurisdiction, "nor to conform its municipal laws to its international obligations" (allow me to observe it), but to modify its legislation so that the Federal authority could intervene in matters occurring in the States, and which might give rise, whether justly or not, to an international question. In this particular your recommendation is worthy of attention. It is but natural that, since we have imitated the form of Government established in your country, we should make use of similar means to obviate the inconvenience of State functionaries happening to compromise by their acts the responsibility of the nation in its foreign relations intrusted to the General Government, and that in such an emergency, the latter might not be able to prevent it. Fortunately the authorities of Chihuahua did in no way compromise that responsibility in the Cutting case, since their conduct was altogether legal and prudent. But, as it might perhaps be otherwise in future cases or in other States of the Union, and the Federal Government of Mexico should have the power to intervene at the proper time, it had some time ago taken note of this necessity and will endeavor to satisfy the same, as far as may be permitted by the constitution of this Republic.

The second example cited by you is the case of France, already mentioned in this note, and in which the Government of that nation yielded to the desires of England by withdrawing from the Senate, in 1852, a bill establishing jurisdiction to judge foreigners who might commit offences abroad against French citizens. It is said that by following

this noteworthy example we would pursue a " highly honorable course."

Besides, the difficulty which would be experienced in endeavoring to make States independent in their interior government change their laws, the great difference existing between the cases of France and Mexico is at once perceived. England asked the former nation not to approve a bill, up to that time only passed by one chamber of the legislative body. In Mexico it would be necessary to abrogate a legislation, or rather several legislations which have been in force during some years. Furthermore, the reasons of international policy concurring in France, as it appears, with an important Convention for the extradition of criminals that was being negotiated, certainly do not exist in our case; neither are the precedents of the request made by the British Government similar in any way to those of the present case. But, above all, there is a very marked difference between the circumstances of England in this connection and those of the United States relating to the same. Great Britain asked France not to adopt in its legislation a principle which she herself does not recognize, at least declaredly, in any of the laws ruling her different possessions; consequently she offered reciprocity and already gave the example. This is not the case with the United States when it asks Mexico to reform her Codes by rejecting the principle we are discussing; because that principle is recognized by the laws in force in a portion of the American Union. It is indeed difficult to understand, how Mr. Moore in his elaborate examination of all or nearly all the legislations of the world, without omitting in America even the smaller States, Costa Rica for instance, could forget that of one so conspicuous and of so much importance in his own country as the State of New York, which with just pride is often, in the neighboring Republic, called the *Empire State.*

In fact, the Penal Code in force in New York since the year 1881 and which, as I am informed, was carefully prepared by very distinguished jurists, contains the following prescription: " § 676. A person who commits an act without this State which affects persons or property within this State, or the

public health, morals or decency of this State, and which, if committed within this State, would be a crime, is punishable as if the act were committed within this State." There are other articles or paragraphs of the same Code in accordance with the foregoing; but it is unnecessary to quote them, as it would also be unnecessary to investigate whether there is another State or Territory of that Republic whose legislation recognizes in such a clear manner extra-territorial jurisdiction over acts of persons in general, without any distinction as to citizens or foreigners, against persons or interests of the State. It is sufficient for my purpose to cite the code of one of those political sections, especially as the one referred to is most important on account of its its intelligence, population and wealth.

That code, in the paragraph quoted, establishes the penal jurisdiction of New York, for acts committed without its territory by any one, even if he be a foreigner, more extensively than the Chihuahua statute; because it merely requires the act to constitute a crime, which comprises, according to its own provisions, every illegal and punishable act, even a simple offence or *misdemeanor* (§§ 3 and 4), whilst that of Chihuahua provides that the act of the foreigner should deserve *arresto mayor* (imprisonment of a certain duration), and the New York statute does not require, as the other does, that the laws of the country where the offence was committed likewise prescribe a penalty for the same. On the contrary, § 678 implies that such circumstance is not a requisite nor an obstacle for the punishment of the crime. "An act or omission (it says) declared punishable by this Code, is not less so because it is also punishable under the laws of another State, Government, or country, unless the contrary is expressly declared in this Code." Nor does it leave the act unpunished by the consideration that it has been pardoned or punished in the place where it was committed.

Neither can it be said that the above-cited prescription limits the punishment of the foreigner to cases in which he has committed an offense against a New Yorker being within his State, on the ground that it speaks of acts affecting a person or property within the State; because, although the

person directly offended might be *outside* at the time of the offence, his family or acquaintances would be *within*, and they would be affected by the scandal or the consequences of the illegal act. Be it as it may, and even supposing that such limitation existed in New York, it could not serve as an argument in the Cutting case, since the offended party, Medina, was within Mexican territory when the offence was committed.

In the Penal Code of Texas the following provision is also to be found: " Art. 454.—Persons out of this State may commit, and be liable to indictment and conviction for committing any of the offences hereinbefore enumerated (forgery of land titles and other documents), which do not in their commission necessarily require a personal presence in this State, *the object of this act being to reach and punish all persons offending against its provisions, whether within or without the State.*" This provision clearly establishes the right of punishing any person, even if he be a foreigner, who commits abroad certain offences, although not all kinds of offences, against the State or its citizens, as does the New York Code. It seems strange that Mr. Moore also forgot the legislation of Texas, though in that State the Cutting incident occurred, which occasioned his report.

In the presence of these provisions we are not able to recognize the right of the United States of America to declare Article 186 of the Chihuahua Penal Code contrary to the law of nations, and to make that the foundation for a claim of damages in behalf of an American, neither to ask us to have that article amended, since the code of one or more than one integral part of that Republic contains provisions which are analogous, if not more advanced, as to the point in question. What reason is there to reform the Mexican codes and not that of New York, for instance, which has the same defect as alleged against those of Mexico? The principal condition required to make an arrangement between two independent nations, honorable for both parties, is that there be perfect reciprocity. In default of that necessary condition, neither will a friendly Government insist upon a proposal made, nor would the other accede to it, unless willing to accept its dishonor.

I shall now close this long note, which imperceptibly has grown in length on account of my wish to touch, even though briefly, several points of the printed report to which you refer. In the foregoing I think it is demonstrated:

1st. That Cutting did not suffer any ill-treatment, nor was he the victim of illegal procedure, and that even his apparent want of defence consisted in his refusing to employ counsel, to ask his release on bail and to interpose any legal recourse, as he always confined himself to saying that he depended solely on his Consul and Government.

2d. That, consequently, there is no reason on that account to entitle Cutting to an indemnity.

3d. That there is no reason either to say, that a law contrary to the law of nations was applied in his case:

A. Because he was not tried solely for the offence committed abroad, but also for the continuation or repetition of the same in Mexican territory; and

B. Because Article 186 of the Penal Code of Chihuahua has not the defect alleged.

4th. The mere fact that said article carries extraterritorial jurisdiction regarding foreigners farther than is done by the majority of legislations of other countries, does not prove that it contravenes the admitted principles of the law of nations.

5th. That law merely establishes general principles, and, when the application of any one of them is controverted, any solution, even if adopted only by a minority of the nations, is a legitimate exercise of their sovereignty.

6th. Such is the case with regard to the question of the so-called objective or quasi-territorial jurisdiction, that is to say, the one applied to a foreigner who commits an offence abroad against a citizen; which question, according to all scientific authorities, far from being decided, remains as one of the unsolved problems of greatest difficulty for juridical science and legislators.

7th. Meanwhile, this jurisdiction, which to-day is admitted in the majority of known legislations, for cases wherein the foreigner has assailed the safety of the nation or injured many of its members by counterfeiting the currency of the country or its bank notes, can, with equal justice, be established for those cases in which the injury is done to a few or only one of its subjects.

8th. The right every State has to impose reasonable conditions for the entrance of foreigners into its territory empowers it to subject them, by the terms of its laws, to responsibility for acts they may have committed abroad against the nation itself or any one of its subjects.

9th. The United States cannot ask Mexico to amend its laws on the subject, even supposing that they had the defect alleged; because that nation has substantially the same provisions in the laws of one or more of the integral sections of its territory.

Before concluding, it affords me pleasure to state, that I believe in the sincerity of the assurances of friendship and regard towards Mexico in which your note abounds. Sincere likewise, and in all respects founded on the conviction of mutual interest, are the friendly demonstrations of sympathy on our part towards the Government and country represented by you. Very significant is the extract which you quote from a message in which President Cleveland alluded to this country: "Nature (he said) has made us irrevocably neighbors, and wisdom and kind feeling should make us friends." Nothing could have been more correctly or more happily expressed. And nothing, moreover, could be better applied to any discussion in which, on account of interests of secondary order, there is danger of sacrificing the good understanding, the harmony existing between the two nations; that friendly feeling which day by day is being developed through easy means of communication, the increa of traffic and the more frequent intercourse between the in habitants of one and the other, occasioning pleasant visi which eradicate deep-rooted prejudices and strengthen mu

tual esteem. All these beneficial influences are greatly jeopardized and might disappear on account of juridical questions which, in our opinion, have now more theoretical than practical interest, except for an individual who seems to be bent on rendering his name hateful in Mexico, without thereby gaining any reputation in his own country. However that may be, the Mexican Government is determined in the present question, as well as in any other, to forego everything for the sake of preserving its friendship with the United States; everything but what may be connected with the national honor or the serious interests intrusted to its care.

I beg to renew to you the assurances of my respectful and distinguished consideration.

IGNACIO MARISCAL.

Mr. THOMAS B. CONNERY,
Chargé d'Affaires ad interim of the United States of America.

(Inclosure. Copy.)

Translation.

MEXICAN REPUBLIC,
GOVERNMENT OF THE STATE OF CHIHUAHUA,
BUREAU 2ND DEPARTMENT OF JUSTICE.

No. 1383.

The President of the Supreme Court of Justice, in official communication No. 741, of this date, says to this Government:

"The Supreme Court of Justice, over which I have the honor to preside, having examined the report and other information presented by the second Alcalde of Bravos with reference to the imprisonment of Mr. A. K. Cutting, has under this date decreed as follows:

"Reserving to decide what may be proper in this case, let a copy of the report given by the second Alcalde of Paso del Norte be sent to the Executive of the State, so that, if he pleases to do so, he may transmit it to the Department of Foreign Relations.

"And I have the honor to communicate it to you, so that you may be acquainted therewith and for the purposes stated in said decree, the copy mentioned being enclosed and containing five full sheets."

I have the honor to transcribe the above to you for your information, and I accompany the copy therein referred to.

Liberty and constitution.

CHIHUAHUA, *July* 23*rd*, 1886.

FELIX FRANCISCO MACEYRA.

TO THE SECRETARY OF STATE AND FOREIGN RELATIONS, MEXICO.

Translation.

MEXICAN REPUBLIC, SUPREME COURT OF JUSTICE OF THE STATE OF CHIHUAHUA.

A seal wherein is written: Second Tribunal of the District of Bravos.

Citizens Justices of the Supreme Court of Justice of the State:

The undersigned second minor judge of this town, in compliance with the resolution of that higher court contained in its decree issued in consequence of the communication from the State Government, dated the 12th inst., wherein a note of the Secretary of State and of Foreign Relations is inserted, presents the following report:

Mr. A. K. Cutting who is the person to whom said communication refers, was accused before this court by Mr. Emigdio Medina of the offense of libel on the 21st of last June, said Medina having presented the correspondent certificate wherein it was stated, that he tried to effect a reconciliation before the said court in regard to the said matter; and said Mr. Medina also presented the evidence of the offence, which has been annexed to the proceedings, and which consisted in an article published in the newspaper "The El Paso Sunday Herald," which article was published in the Spanish and English languages and read as follows:

"To EMIGDIO MEDINA, *of El Paso del Norte:*

"EL PASO, TEXAS, *June 18th*, 1888.

"In a late issue of 'El Centinela' published in Paso del Norte, Mexico, I made the assertion that said Emigdio Medina was a 'fraud' and that the Spanish newspaper he proposed to issue in Paso del Norte was a scheme to swindle advertisers, &c. This morning said Medina took the matter to a Mexican Court, and I was forced to sign a 'reconciliation.'

"Now I do hereby reiterate my original assertion that said Emigdio Medina is a fraud and add 'dead beat' to the same. Also that his taking advantage of the Mexican law and forcing me to a 'reconciliation' was contemptible and cowardly and in keeping with the odorous reputation of said Emigdio Medina.

"And should said Medina desire American satisfaction for this reiteration, I will be pleased to grant him all he may desire, at any time, in any manner.

"A. K. CUTTING."

By virtue of the accusation and after examining the article alluded to, an order of arrest was issued against A. K. Cutting, on the said 21st, and on the 23d of the same month I summoned him before me. After the legal formality had been gone through, the defamatory article written against Medina after the reconciliation having taken place, was shown and read to him by the official interpreter. He was asked if he was the author of that article and if it had been his intention to injure the reputation of Medina. As an only answer I received the following:

"I am not obliged to answer the questions put to me on this subject, because it took place in El Paso, Texas, and, with regard to any proceeding, I place myself under the protection of the American Consul's flag."

He was asked if he had in his possession, for distribution, some copies of said paper, and he made the same reply as to the first question.

He was also asked, why he had violated the agreement of rec-

onciliation made with Mr. Medina before this same court. He replied that he would beg to be permitted to give no answer. His declaration was then read to him by the official interpreter, and he ratified and signed it with the judge, the official interpreter and the witnesses Pedro Tellez and Pedro J. Garcia.

On the same date he was declared to be legally arrested, and was notified that he could at once name a counsel to defend him, and was told who was the prosecutor; he appointed the licentiate José Maria Barajas his counsel and added that he would immediately advise his counsel thereof. The record of this proceeding was then signed by him together with the interpreter, the judge and the aforementioned witnesses.

As the prosecution was instituted against a foreigner, this court had him placed in one of the most commodious rooms of the jail, it being clean and in the best hygienic condition, in order that it might not be said that on account of his nationality he was shut up in the worst cell of the jail.

On the twenty-sixth of the same month the clerk of the United States Consul, residing in this town, came to see me, and said that he had been directed by the Consul to ask me in his name to give him some information respecting the prosecution against Mr. A. K. Cutting, and handed me a communication from the Consul. I assured him I could not give him any information, because the law expressly prohibited it, and I repeated the same thing in my answer to his communication, in which he said as follows:

"SIR: I have the honor to officially communicate with you in regard to the arrest and imprisonment of A. K. Cutting, an American citizen, by your order.

"I have been informed by the official interpreter to your court that Mr. A. K. Cutting was arrested, examined, and incarcerated for an offense (if offense at all) committed in the State of Texas, United States of America, which was the publication of a card in the El Paso (Tex.) Herald.

"It is scarcely necessary for me to call the attention of Your Honor to the fact that for an offense committed in the

United States your court cannot possibly have any jurisdiction. Therefore the arrest and detention of Mr. Cutting in jail is wholly unwarranted and oppressive, and in violation of one of the sacred principles of American liberty. This communication is for the purpose of making a formal demand upon Your Honor for the immediate release of Mr. Cutting, which I do in the name of the United States Government, which I have the honor to represent at this point.

"Trusting that you will comply with my request and petition in his behalf, and order his immediate release,

"I am, &c.,

"J. HARVEY BRIGHAM, *Consul.*"

On the 30th of the same month I answered him in these words:

"In reply to your note dated the 26th inst. I have the honor to inform you: that every magistrate in the criminal department is forbidden by express law, to give any information in criminal cases pending before his court, to persons who have no legal interest therein, as, according to the principle laid down by Peña y Peña, in his work entitled 'Lessons of Mexican Court Practice,' vol. I, section 97, page 507, consuls have no criminal jurisdiction over their fellow-citizens, and this principle is applicable to the case of Mr. Cutting.

"Consequently, I cannot order his release except in the manner prescribed by the laws of this country.

"I remain your obedient servant."

On the fifth inst. I had said Mr. Cutting brought out of jail in order to inform him of a decision given in his case; the same was read to him by the official interpreter, he answered that he had heard it and again said, that in this matter he had placed himself under the protection of the American Consul; he refused to sign even what he had said. The judge then had the evidence taken down in the presence and under the signatures of four witnesses, namely: the citizens Santos Bermudez, Pablo Lopez, Martin Gomez and Antonio Alvarez.

When the proceedings were at the stage in which the prosecuting attorney was to receive his copy thereof, I made Mr. Cutting appear before me on the 19th inst. for the purpose of informing him of that proceeding; he was informed thereof and then asked, if the article to which the public prosecutor referred was written by him and if he ratified it.

While it was being read by the interpreter, he caused the reading to be stopped, saying that he had read it already and that he did not wish to answer. He was asked, if he would sign the notification, and he answered he would not sign any paper. Then I had the evidence thereof taken down before four witnesses who signed with me and with the official interpreter. These are the facts such as they occurred, and as for the truth of my assertion, that Mr. Cutting has not asked to be released under bail, I prove it by the certificate of the prosecuting attorney, made out on one leaf, which I have the honor to annex, respectfully asking of the Supreme Court, that my rights be reserved to prosecute Cutting as the author of the defamatory charges as well as for what he asserts with reference to the interview had with the American reporter, because, as that tallies with the facts which were proven against him in the case, I have not the slightest doubt, although Cutting has not wished to answer, that he was the author of that libelous fabrication.

Liberty and the constitution.

PASO DEL NORTE, *July* 21*st*, 1886.

R. CASTAÑEDA.

The foregoing is a copy taken from the original, and I legalize and sign it, by virtue of superior order.

CHIHUAHUA, *July* 23*d of the year eighteen hundred and eighty-six.*

JOSÉ M. MARQUEZ, *Clerk.*

Translation.

MEXICAN CONSULATE AT EL PASO, TEXAS.

No. 21.

EL PASO, TEXAS, *April* 23*d*, 1887.

By request of the prefect of Paso del Norte I went, accom-

panied by several other representative residents of that town, to a meeting of the board of trade of this city, which was to and did take place on the evening of the 21st inst., and where the question to be discussed was the conduct of Mr. Pedro G. Garcia, the reputed editor or writer of the "Observador Fronterizo," which is published at this place and has given rise to numerous complaints from both sides of the river. The Mexican committee was kind enough to appoint me its chairman, and as such I had to explain to the Board of Trade, at whose meeting we were received in the most friendly manner, the causes of complaint existing against Mr. Garcia, in jail at Paso del Norte, and against whom there is an accusation pending here also. It was very easy to make those present understand, how injurious it was for both places to have on both sides persons whose only occupation was to criticise, slander and defame the public authorities and respectable citizens, without any regard for the families whose peace of mind was disturbed by unjust attacks on private life; which was done as a means of speculation, as it was the only way to render their publications interesting, and that, therefore, the co-operation of parties on both sides was necessary for the prosecution of the offenders in a legal manner, for which purposes the very respectable assistance of the board, there represented by many of its members, was requested. That invitation was warmly received, and immediately the resolutions inserted in the article contained in the annexed cutting of the "Times," of this place, were presented.

At that moment Mr. Julian, President of the Board of Trade of this place, came in, accompanied by Mr. Gutierrez, printer of the libels of Mr. Pedro G. Garcia and being the person whom the latter has tried to make appear the responsible party. Mr. Gutierrez said, that Mr. Garcia, and not himself, was the author of all the articles which had been denounced, and thereupon he delivered the manuscript said Mr. Garcia had sent to him from the jail where he is at present, and which were intended for number 3 of a paper called "La Tempestad" which had been the cause of Garcia's imprisonment at Paso del Norte, and which he has

determined not to publish, in view of the action the Board of Trade has decided to take against such clandestine publications. I shall send this manuscript and forward the declaration made by the printer Gutierrez to the Civil Judge of Paso del Norte, who is trying Mr. Garcia's case.

All which I have the honor of communicating to you, saying, in addition, that the charge made by Mr. Ochoa against the said Garcia before the courts of this place, for libel also, is still pending.

I renew to you the assurances of my distinguished regard.

I. ESCOBAR Y ARMENDARIZ.

TO THE SECRETARY OF FOREIGN RELATIONS, MEXICO.

The El Paso Times, Saturday Morning, April 23d, 1887.

BOARD OF TRADE.

A lively meeting and many important matters discussed.

The meeting of the Board of Trade, Thursday night, was the first meeting of that body for several months. But the large number in attendance Thursday night and the energy and harmony that were exhibited made it clear that the organization is far from collapsing. President Julian presided and J. A. Smith, of Smith & Thompson, was appointed secretary *pro tem.*, Secretary Levy being absent.

A delegation of Mexican gentlemen, headed by Consul Escobar, appeared. President Julian explained that they sought the aid of the board of trade in suppressing such libelous articles as those for which Pedro G. Garcia was now in jail. Officials and private families in Paso del Norte had been made the subjects of scandalous articles which had appeared in a paper printed in an El Paso newspaper. The proprietor of said office had explained that, the paper being in Spanish and he not reading that language, he did not know the tenor of the articles till after the paper had been published. Señor Escobar also addressed the meeting, after which the following resolutions were passed:

Resolved, That the Board of Trade of El Paso, Texas, assures the people of Paso del Norte, Mexico, that they will

endeavor to not only stop, as far as in their power, the publication of such scandalous articles, but will aid them in suppressing all such and bringing to justice the perpetrators of such untimely assaults.

Resolved, That the Board of Trade denounce in the most severe terms the conduct of a person by the name of Pedro Garcia, a Spanish subject, in publishing and circulating slanderous articles reflecting upon the character and integrity of some of our most respectable neighbors in Paso del Norte.

One of the Mexican gentlemen present said, that the person José Ruiz Gutierrez, who signed the Garcia libel, was *Francisco P.* Gutierrez, who was a fugitive from justice and who stole the money from the bank at Paso del Norte. He was the Mexican employed at the Herald office in charge of the job department, and was subject to extradition.

After expressing their hearty thanks the delegation withdrew.

ERRATA.

Page 4.	Line 18.	For *Legislatif* read *Législatif.*
Page 8.	Line 10.	For *supreme* read *Supreme.*
Page 11.	Line 5.	For *principal* read *principle.*
Page 15.	Line 8.	For *Charge* read *Chargé.*
Page 15.	Line 10.	For 13*th* read 15*th.*
Page 17.	Line 15.	Omit the comma after *one.*
Page 20.	Line 19.	Omit the words *to be considered.*
Page 20.	Line 23.	Omit the comma after *encouraged.*
Page 21.	Line 6.	Omit the comma after *licentiate.*
Page 21.	Line 8.	Omit the word *to* before *avail.*
Page 21.	Line 27.	Insert a comma after *said.*
Page 27.	Line 3.	For *its* read *their.*
Page 31.	Line 8.	For *lengthly* read *lengthy.*
Page 33.	Line 15.	Omit the commas after *countries* and *coming.*
Page 35.	Line 36.	For *territorialty* read *territoriality.*
Page 36.	Line 30.	Insert a comma after *discussion.*
Page 38.	Line 13.	Insert the word *that* before *such.*
Page 39.	Line 25.	For *clearlv* read *clearly.*
Page 43.	Line 36.	For *emanates* read *emanate.*
Page 48.	Line 8.	Insert the words *the above mentioned* before *cited*, and omit the word *cited.*
Page 48.	Line 8.	For *writers* read *writer.*
Page 51.	Line 17.	For *Constitutiou* read *Constitution.*
Page 51.	Line 18.	For *Constitntion* read *Constitution.*
Page 52.	Line 1.	Insert a comma after *jurisdiction.*
Page 52.	Line 27.	Omit the comma after *ours.*
Page 53.	Line 4.	Omit the comma after *conduct.*
Page 56.	Line 3.	Omit the comma after *Besides.*
Page 57.	Line 14.	Omit the word *its* before *intelligence.*
Page 62.	Line 7.	For *constitution* read *Constitution.*
Page 68.	Line 11.	For *I.* read *J.*